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WARE'S REPORTS.

REPORTS

OF

CASES DETERMINED

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE

DISTRICT OF MAINE AND MASSACHUSETTS,

WITH SOME OPINIONS OF THE DISTRICT JUDGE

IN CASES DETERMINED IN

THE CIRCUIT COURT.

BY ASHUR WARE, DISTRICT JUDGE.

VOL. 3.

BY GEO. F. EMERY.

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1874.

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PREFACE.

A SHORT time prior to the death of JUDGE WARE, the materials constituting the principal contents of this volume were placed in the hands of the Reporter, for the purpose of preparing the same for publication in a form suitable for preservation. Some of the more important cases, especially those decided in Massachusetts District during the temporary illness of Judge Sprague, have been heretofore published in periodicals of an ephemeral character, but the major part of them has never appeared in print in any form.

In preparing this, the third and last volume of 'Ware's Reports,' the Reporter did not have the benefit of the supervision of the author of these 'decisions,' which will account for (especially among those familiar with JUDGE WARE'S chirography) defects which otherwise would have been avoided. But however defective the manner of executing the work, the text of the volume will be found as perfect as was practicable to make it during the process of printing; and although errors in the citations of authorities may be frequently noticed, especially of Statutes, those can be readily overcome by referring to the 'Errata,' which has been prepared with care since the body of the work went to press.

No apology surely will be required for preserving in an enduring form the eulogiums found in the appendix, much less for giving to the public the latest opinions of him of whose prior ones the eminent Judge who succeeded their author so recently said, 'I believe no treatises or reports are now extant which are at this moment more useful to the profession, or more frequently acknowledged as authority, or which can afford more knowledge and information, than these reports.'

PORTLAND, 1874. GEO. F. EMERY.

92062

ADVERTISEMENT.

THIS volume contains the latest opinions of Judge Ware, and is entirely new. It is a sequel to the first and second volumes (the latter originally entitled 'Daveis' Reports') issued in his lifetime. All together give to the public the benefit of his judicial labors for more than forty years. Congress having failed to confer on him the advantages of the retiracy provisions now provided for Judges of the Federal Courts, this publication appeals with all the more force to the patronage of a profession not wont to ignore the service of a public benefactor.

ERRATA.

For correction of Statutes cited, see Index, pp. 387–8, where the citations will be found accurately verified.

On page 24, 19th line from top, after the word 'engagements,' insert the word 'remain.'

On page 31, 2d line from bottom, read '188,' instead of '187.'

" 35, 5th line, insert '2d Curtis' R. 427.'

" 36, 3d line from bottom, for 'Toulier,' read 'Toullier.'

" 37, 2d line, for '*iniquam*,' read '*iniquum*.'

" 37, " for '*corum*,' read '*eorum*.'

" 37, 3d line, for '*damnoram*,' read '*damnosam*.'

" 63, 8th line from top, for 'Ware, 103,' read '2 Ware, 203.'

" 63, 14th line from top, for '*æstimatur*,' read '*æstimantur*.'

" 63, 15th " " for '*fuerant*,' read '*fuerunt*.'

" 63, 15th " " for '*concurrant*,' read '*concurrunt*.'

" 63, 15th " " for '*liect*,' read '*licet*.'

" 64, 5th " " read '1 Ware, 286.'

" 84, 3d line from bottom, for 'Touiller,' read 'Toullier.'

" 85, 18th line from top, for '203,' read '20, § 3.'

" 107, 5th " " for '*nique malities*,' read '*neque malitiis*.'

On page 117, 7th line from bottom, after the word '*accipitur*,' insert the word '*id*.'

On page 117, 7th line from bottom, for the word '*mora*,' read '*moræ*.'

On page 132, 17th line from bottom, for the word '*Rowe*,' read '*Rocca*.'

On page 132, 16th line from bottom, erase the words 'that if.'

" 152, 11th line from top, for '*respondeant*,' read '*respondeat*.'

On page 152, 12th line from top, read '*French* v. *Fuller*, 23 Pick. 108,' instead of '*Francis* v. *Fuller*,' &c.

On page 158, 9th line from bottom, before the word '*contra*,' insert the word '*vero*.'

On page 267, 12th line from bottom, erase the word 'taking.'

" 321, and wherever it occurs, substitute 'Polledo,' for 'Palledo.'

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REPORTS OF CASES

DECIDED BY

ASHUR WARE, DISTRICT JUDGE

FOR THE

DISTRICT OF MAINE.

HIGGINS IN EQUITY *vs.* JENKS.

Bill in equity for the specific performance of a contract for the sale of three-eighths of a ship now being built, with the right of the purchaser to the command, and for an injunction on the owners of the five-eighths against selling the same except with notice of this contract, and subject to whatever right the plaintiff may have under it, and against appointing any other person as master.

If the contract gives him any right in the nature of a privilege and preference to the command of the ship—an obligation, charge, lien, or *nexus* which follows and adheres to the thing, and qualifies the right of ownership, he is entitled to protection by injunction against the transfer of the five-eighths of the vessel without notice of his contract and of whatever rights he has under it.

But whether a preliminary injunction should issue against the appointment of any other person to the command is a question not free from doubt. The grounds on which Courts of Equity take jurisdiction to decree a specific performance of contracts stated. The rights of co-owners as to possession discussed.

IN THE CIRCUIT COURT FOR MAINE DISTRICT.

The facts in the case were fully stated in the opinion of the Judge.

Fessenden & Deblois of Portland, and *Merrill* of Bath, for the plaintiff.

Willis & Fessenden and *Shepley*, for the defendants.

WARE, *District Judge.*

December, 1853. This is a bill in equity seeking a specific execution of a contract. On the 9th of August, the defendants being then engaged in building a ship of about 1100 tons burthen, the plaintiff entered into a written contract for the purchase of three-eighths of her, upon which he was to pay at the rate of fifty-five dollars a ton, two-thirds of the amount in cash, deducting therefrom the cost of the rigging, which he was to furnish, and the other third in his notes, indorsed by Brookman & Co., of New York, in four, nine, and twelve months; and it was further agreed that Higgins should superintend and direct the completion and the rigging of the ship, for which he was to receive no other compensation than payment of his board; and that when completed he should sail her as master and have for his compensation the best wages with primage, etc., allowed to masters commanding similar ships from the port of Bath. In conformity with the agreement, the plaintiff has superintended and directed the work on the ship from the time of the contract until about the time of filing the bill; has furnished the rigging as it has been wanted, and made all his cash payments as often as demanded, and is now ready on the completion of the ship to deliver the securities named in the agreement for the balance due.

The plaintiff apprehending that the defendants intended to disable themselves from performing their part of the contract by a sale and transfer of the vessel, filed this bill praying for an injunction against a sale of the three-eighths bargained to him, and on their disavowing any such intention, amended his bill praying an injunction against the sale of the other five-eighths, except with notice of his contract and subject to whatever rights he has under it, with a

further prayer for an injunction against appointing any other person as master, and for a specific execution of the contract.

Since the filing of the bill, the defendants have transferred five-eighths of the ship to Messrs. John and George Patten, and by a further amendment they have been made parties defendant, and the same remedies by injunction and specific performance are asked against them.

The original defendants have appeared and put in affidavits admitting the contract, and offering to convey the three-eighths, and giving as a reason for refusing to fulfil the contract by putting the plaintiff in as master, that they have, since the contract was made, heard many reports and stories in disparagement of the plaintiff's character as a ship-master, and against his truthfulness and integrity in his dealings as a man, from which they have become satisfied that he is not a fit person to have the command and management of such a ship, and that they should not consider their property in her to be safe in his hands.

Mr. George Patten, one of the new defendants, has put in an affidavit admitting the purchase of five-eighths of the ship of Jenks & Harding, and stating that a parol agreement for the purchase was made on the fifth of the month, the day on which the bill was filed, but that the contract was not completed, and the transfer made by a bill of sale, until the eighth, three days after,—admitting that he knew that Higgins was the purchaser of three-eighths, and that he expected to go as master, but that he did not know the precise terms of the contract.

As to the Messrs. Pattens, the purchasers, their purchase was made under such circumstances that they must be deemed and considered as having purchased with full notice of the contract with Higgins. They knew of his contract, and they knew of his expectation of going master. The contract was in the hands of their venders, and they might have seen it by asking for it, as it was their duty to do. I consider them as standing on the same ground, and having the same rights as their venders, and no others. They

took the five-eighths subject to all the right which Higgins had against Jenks & Harding.

The defense made by the affidavits of Jenks & Harding against a preliminary injunction till the hearing, and the same will be relied on at the final hearing against a decree for a specific execution, is in substance that of a surprise; that at the time of the contract they supposed Higgins to be a well qualified master, and a trustworthy man; that they are now undeceived, and from what they have since learned of his qualification as a ship-master, and of his character as a man, they verily believe that they cannot, with safety and prudence, confide to him the command of the ship, or entrust to him the management of their property. But it is not pretended that they were deceived by any artifice or management on the part of the plaintiff.

The negotiation between the parties for the sale and purchase of this vessel, commenced sometime before the contract was consummated; the precise time does not appear, but I infer from the affidavits and the exhibits in the case in the early part—at least as early as the middle of July. It was completed on the 9th of August. Capt. Higgins is a native of this State, and was born and brought up in Orland, an adjoining town of Bucksport. Early in life he had been in the command of two small vessels in this State, engaged, I infer, in the coasting trade. Afterwards he went to New York, and was there employed as a ship-master. If he was a stranger to the defendants, it would seem that during the month in which the negotiations were pending, the defendant might, without difficulty, have made all the necessary inquiries, and obtained all the necessary information in relation to his qualifications and character, and it is hardly to be supposed that, as men of ordinary caution and prudence, they would have agreed to intrust to his management and control, so large and valuable a property as five-eighths of this ship, of the value of $37,000, according to the rate at which the sale was made to plaintiff, or that they would have been willing to have entered into that confidential relation of joint

owner of the vessel, intrusting to him the command, unless they had been pretty well assured of his qualification as a seaman, and of his integrity as a man. With all this time and opportunity for informing themselves, it seems to me that their excuse of surprise for not fulfilling their engagement ought to be scrutinized pretty narrowly. It was nearly three months after the plaintiff had been engaged in executing his part of the contract, and about four from the commencement of the negotiation for the purchase, that he was informed that he would not have the command of the vessel, though I cannot but believe that it must have been well understood by the defendants that this was Capt. Higgins' principal object in the purchase; that it was not so much his object to make an investment in the vessel, as to provide himself with an honorable and lucrative employment.

If, however, it is made satisfactorily to appear that here has been a real surprise; if it be shown that for want of capacity and want of integrity, the plaintiff is unfit to be intrusted with the command of such a ship, and that the defendants cannot safely intrust their property in his hands, as this application for an injunction and specific performance is addressed to the discretion of the court, and is not a claim strictly *ex debito justiciæ*, my opinion would be that he ought to be left to his remedy at law. Under this view of the subject it becomes necessary to examine the foundation of the defendants' excuse for not performing their engagement. They have produced a large number of affidavits in their justification, most of them from persons residing in Bath, Bucksport, Eastport, and Calais, in which places he seems formerly to have been best known, all speaking of him in terms strongly unfavorable; some who have had dealings with him charging him with dishonesty, others speaking only of his general reputation for want of integrity, and for want of veracity, and several of them adding that he commonly was known by the name of the lying Higgins. They uniformly speak of him as a man unfit to be intrusted with such a vessel. All this testimony is open to one general observation, that it relates to a

period ten or twelve years ago, when he was employed in the command of small vessels in the coasting trade of this State, and while he was young, and soon after arriving at his majority.

Some years ago, precisely when does not appear, but as I collect it from the affidavits eight or nine years, the plaintiff left this part of the country and went to New York, and has since been employed as a ship-master from that port. The defendants have produced two affidavits from New York, one of Richard P. Buck, formerly of Bucksport, and now a commission merchant and ship-owner of New York, who states that he has been acquainted with Capt. Higgins for six years, that he has been consigned to him but never employed by him, that he thinks him unfit to have the command of a ship of 1000 tons, that he would not intrust him with the command of a ship, because he believed him to be incompetent, that he considers him untrustworthy and irresponsible, that he would not trust him for a hundred dollars, and he adds that he should not have given his affidavit if he had not been called upon by a subpœna. The other is of Benj. Carver, formerly a ship-master, and now a dealer in ship chandlery. He has known Higgins for three or four years, has but little acquaintance with him, but has formed an unfavorable opinion of his character, and would be unwilling to purchase into a ship of which he was part owner. This is all the evidence which the defendants have produced from New York, where the plaintiff has been employed for the last eight or nine years. That of Carver is a little, and but a little more than negative. That of Buck is explicit and full as to his opinion, and it may be remarked that he is the only one of the affiants, who has taken pains to inform us that he gives his affidavit from necessity, and in the same breath says that he would not trust the plaintiff for one hundred dollars. This appears to me to be pretty strong language for an unwilling witness towards a neighbor, who has shown himself able to fulfil a contract for more than $20,000.

The defendants have also produced the affidavits of Mr. Curtis and of Mr. Dimmock, each president of an insurance company in

Boston, who had insured vessels commanded by the plaintiff and had had losses. They both say that after examining the statements of the losses and the circumstances under which they happened, they were so dissatisfied that they should be unwilling to insure a vessel of which he had the command. If this evidence stood alone, and unexplained, and unqualified, it would appear to me to be entitled to very grave consideration. If the plaintiff has justly earned such a reputation that where his character is known, a vessel under his command could not be insured at all, or not at the usual rate, it would be a decisive objection to the application that he here makes, and I should feel bound to leave him to his remedy at law. But in this connection it is proper to consider the affidavit of Zebulon Cook, formerly of Boston and now of New York, an Insurance Broker of great experience, and entitled to full credit as a man of integrity and as an expert in the business. He was employed by the owners of one of the vessels insured in Boston, to prepare a statement of the loss, and he says that in making up the statement, his intercourse with Capt. Higgins was protracted for some weeks, and that in the information and explanation he gave, he showed so much frankness and fairness that he became favorably impressed towards him; and that he has heard nothing since to change that opinion. This was one of the cases from which the Boston insurers formed their unfavorable opinion, and perhaps it would not be unreasonable to allow one opinion to balance the other.

To meet this testimony impeaching his character, the plaintiff has produced the affidavits of five gentlemen of New York and six from Boston belonging to reputable mercantile houses, who have been acquainted with him for the last seven or eight years, who have had transactions of business with him, all speaking in strong terms of his capacity and integrity, opinions which they have formed from their intercourse with him in business as well as from his general reputation. One of them, Mr. Deshon, of Boston, was acquainted with the affair of the Kanahwa, one of the insurance cases complained of by the Boston offices, and formed so favorable

an opinion from his own observation and what he heard from others, that he was very desirous of selling him part of a ship as late as last August, and putting him into her as master.

On a fair consideration of the plaintiff's affidavits, I think that they more than balance and neutralize those of the defendants. These relate almost exclusively to a period ten or twelve years ago. The plaintiff was then a young man just past his majority. They undoubtedly leave on the mind an unfavorable impression of the plaintiff's character at that time. But whatever the truth may be, this has not prevented him from obtaining employment, and rising in his profession, and passing from the command of small coasting vessels to those of a larger class engaged in foreign trade; and for the last nine or ten years, while he has sailed from New York, notwithstanding the opinion of Mr. Buck, I feel bound to consider him as having maintained a fair reputation as a ship master, and as qualified and competent for any kind of business, he may be required to transact in that employment, and I must hold that the excuse which the defendants have offered for not performing their engagements to be removed.

The question then fairly arises, and to my mind free and disembarrassed, whether the plaintiff, on the principles upon which courts of equity exercise this discretionary jurisdiction, is entitled to the relief, by way of injunction, for which he asks. As to the first prayer of the bill, that is an injunction against the transfer of the five-eights of the vessel without notice of his contract, and whatever rights he has under it, I can see no objection to it. If the contract gives him any right in the nature of a privilege and preference to the command of the ship, an obligation, charge, lien, or *nexus* which follows and adheres to the thing and qualifies the right of ownership, it is what he has bargained and paid for, and whatever it may amount to he is on every principle of justice entitled to. If it is a right of any value, he might lose it by a transfer to a *bona fide* purchaser without notice. But, if with notice, he would have the same right, whether it is to a specific performance or on-

ly to a compensation in damages against the assignees, or against the original owners.

As to the second prayer for an injunction against the appointment of any other person to the command, there is certainly much more difficulty; nor do I pretend, after the best consideration I have been able to give to the subject, to hold an opinion free from doubt. It appears to me that this injunction ought not to be granted, unless on the ground that the contract is a proper one for a decree of specific performance, and this is only to be determined at the final hearing. I am aware that it is not unusual in cases admitting of doubt for the court to grant a preliminary injunction, to preserve all matters unchanged till the hearing, but it is usually in cases where things may remain in *statu quo* without sacrifice to either party. In this case the effect may be to keep the vessel unemployed at the wharf till the hearing, to the injury of all interests.

Without undertaking to anticipate what may be the opinion of the court on a final hearing, it may not be out of place here to remark that the grounds on which Courts of Equity take jurisdiction to decree a specific performance of contracts, is, that a court of law can give for the breach of a contract no other remedy than damages; that in the particular case damages are an imperfect and inadequate remedy; that it is against conscience to leave to a party his election, either to pay damages for a voluntary breach of his engagements, or faithfully to perform them, and that it is unequal and unjust to the complainant to leave him to recover, by a suit at law, such damages as a jury may think proper to give him, in a case where the damages are uncertain and conjectural, instead of having the full benefit for which he has bargained by a specific execution of his contract. 2 Story's Eq., §§ 717, 719.

It cannot be denied that this reasoning of courts of equity applies in its full force to the present case. It is sufficiently apparent in this case that the principal object of the plaintiff in this purchase was not a mere investment of money. It was to provide for

himself a safe, lucrative, and honorable employment in his profession. If he had purchased only as an investment, there would be no particular hardship in leaving him to an action of law for damages. A jury would have a clear and intelligible rule by which to ascertain the damage. But by what rule is a jury to calculate the damage to the plaintiff of the disappointment in being thrown out of employment, with all his available means locked up in this vessel. It is plain that the damage is altogether uncertain and conjectural.

The counsel for the defendant have urged several objections to the granting an injunction, in a line of argument tending to show that this is not a case for specific performance. By what process, it is asked, will the court enforce a specific performance, and if it is enforced of what avail will it be for the plaintiff? The force of this argument presses on the prayer for an injunction against appointing any other person as master. It is said, if the plaintiff is placed in the command, that the defendants, being the major owners, may immediately displace him and appoint a new master, and that a decree for a specific performance would be nugatory. What the plaintiff asks for, and what he has bargained and paid for, is that the ship shall be finished and made ready for sea with all convenient speed, and he placed in the command. He has performed, or tendered the performance of, all his part of the contract in its precise terms, and he claims a like performance on the part of the defendants. When the contract is carried into execution they may exercise all the rights the law allows them. Whether they, as major owners, can immediately remove him from the command will be the subject of after consideration. It is certain in ordinary cases the major owners have this right. They may displace a master without assigning any reason.

But if the master is a part owner, a court of admiralty, by which this jurisdiction is exercised, according to Lord Stowell, requires some justifying cause to be shown by the major owners beyond their own pleasure before it will interfere to displace him. *The New*

Draper, 4 Rob. 290. By the common law, as a tenant in common, he has equal right to the possession with any other owner, and the admiralty pays so much respect to his common-law right that it will not interfere to disturb his possession without some cause shown, and would, I think, be reluctant to do it without a sufficient cause when the master was in possession under such a contract as this.

On the whole, I shall grant both parts of the injunction asked for. And I do it with less reluctance as the injunction is only until the further order of the court. If I am wrong, no irreparable injury will be done to the defendants, as they may at any time apply to the Circuit Judge to have the injunction removed.

NOTE.—This case did not proceed to a final hearing, it having been adjusted by the parties.

THE LARCH.

A part owner of a vessel, when the other part owners are present, has no authority to charge them by ordering repairs without their consent.

But when a part owner is in possession he has that authority, when the vessel is in a foreign port and the other owners are absent.

In the latter case, he has a lien for his disbursements on the other owners' shares which he may enforce by a libel *in rem* in the admiralty.

The admiralty has no jurisdiction over matters of account, merely as accounts, although it may have jurisdiction over all the items in the account.

If it is apparent from the pleadings, that the main object of the libel is the settlement of the account, the libel will be dismissed.

If the accounts arise incidentally in the cause, then it is a question of sound discretion, whether the court will proceed with the cause. If the accounts are simple, consisting merely of offsets, the court will strike the balance and give judgment for that. If they are multifarious and involve the settlement of intricate questions of law or equity, which more properly belong to another forum, the libel will be dismissed.

Note on the Noxal Action of the Roman Law.

August, 1855. This case was argued on the allegations in the libel and answer by *Gen. Fessenden* for the libelant, and *W. P. Fessenden* for the claimant. The facts, so far as they are necessary to understand the question involved, are stated in the opinion of the Court.

WARE, *District Judge.*

The libelant being the owner of one moiety of the Brig Larch, in 1851, with one Fall the owner of the other moiety, it was mutually agreed between them that the libelant should take the Brig and employ her on shares, upon the common terms on which vessels are so employed, the owner to keep her in repair, the employer to victual and man her at his own expense, the port charges to be paid one-half by him, as employer, and the other half by the owners, and the net earnings to be divided equally between the owners and the employer. Under this agreement, the libelant will be en-

titled to three-quarters of the earnings, one-half as employer and charterer, and one-quarter as part owner, and Fall to the other quarter.

The Brig appears to have been successfully employed up to August, 1854, in the coasting trade. She then took out a register and went to Pictou, Nova Scotia, and took in a load of coal for Nantucket. And here commenced a series of misfortunes which have been the occasion of this libel. She was found when loaded to leak considerably, not, however, so much but that she started on her return voyage; but having, unfortunately, got aground, the leak increased to such a degree that she was obliged to tranship her cargo, and she returned for repairs. And it was not until after a series of mischances and hardships, continued from October 19, to the latter part of January, that she was able to return to her home port. A particular detail of these misfortunes is unnecessary to a correct understanding of the case, as it is not pretended that they are imputable to any want of skill or prudence on the part of the master, but were purely fortuitous. But one additional fact should be noted, as it may give a material coloring to the legal aspect of the case. The vessel when she started on her voyage for Pictou was undoubtedly unseaworthy. Her immediately preceding voyage had been to the Southern States for a cargo of lumber, in which she was materially injured in her bottom by worms, but this was unknown by the master and owners. And another fact may be mentioned which quite as materially affects the equitable aspect of the case; that while these repairs were being made, or soon after, Fall sold his moiety to the claimant and insolvent vendee, who will take the vessel with the benefit of all these repairs and leave the libellant practically remediless, or to seek a remedy through doubtful litigation.

During this period the libelant was subjected to expense for repairs, wages, and board of the crew, and the loss of his own time, according to the schedule rendered, of $5149.74. It is charged in the libel, that these disasters and losses were occasioned by the un-

seaworthiness of the vessel when she started on her voyage for Pictou. The libel is brought to enforce a lien on the vessel to answer for damages occasioned by the fault of the vessel.

The demands embraced in the libel are various in their character. The evidence to sustain them has not been produced, and the question in this stage of the case is, whether a libel will lie in the admiralty for any part of them. If it will, the libel ought not to be dismissed, but the cause should proceed and the question be determined hereafter for what part of his claim he has a lien on the ship.

The legal relation of the libelant to the ship was of a very complex character. He was master, part owner in possession, and ship's husband, and charterer of the moiety against which he is seeking satisfaction. And if in any of these relations he has a claim against the ship for any part of his expenditures, this libel may be maintained. His claim in each, has been presented by the counsel in a learned and able argument, and by a thorough and critical examination of the decided cases as well as of the general and acknowledged principles of law.

By insisting on his rights in one of these characters, he does not waive those in another; but as part owner in possession, he presents, perhaps, the strongest claim. By the general maritime law, and as it stood in the earliest ages and is now generally received, that he had a right to order these repairs and charge the vessel for them, is beyond controversy. *Emerigon Contrats, a la grosse*, c. 4, §§ 4 and 5. The authorities quoted by Emerigon place it beyond doubt. We have adopted that law with some modifications, but those which will not, I think, exempt a part owner in this case.

In Abbot on shipping (Part 1. § 4, p. 105 of Fifth Am. Ed.), it is said, that one part owner may render his companion liable for the cost of repairs unless this liability is expressly provided against. He is confirmed by Chancellor Kent in his Commentaries. The law, he says, presumes that a part owner in possession is invested with authority, by the other part owners, to order all that is neces-

sary for the preservation and employment of the vessel. 3 Com. 155. Story gives it as his deliberate opinion, as best supported by reason, if not authority, that a part owner in possession, is authorized to bind the other part owners, by ordering on the common credit, proper repairs and necessary outfits for the voyage, though a diversity of opinion on this subject has been expressed both in this country and England. On Partnership, §§ 442–444; *Doddington* v. *Hallet*, 1 Ves. 497; *Ex parte* Young, 2 Ves. 2 Bram. 242; *Ex parte* Harrison and Rose, 76; *Mumford* v. *Nichol*, 20 John, 611. *Nichol* v. *Mumford*, 4 John, Ch. R, 522. This is in case the other part owners do not expressly dissent. Without going into an exhausting examination of the contradictory and irreconcilable cases, I rely on the opinions of three of the most celebrated maritime jurists of the age.

These authorities apply only to the personal liability of the part owners, and this is a suit *in rem*. But the libelant was not only part owner; he was ship's husband and master. And it is a principle acknowledged in all our books and too well settled to be brought into controversy, that the contract of the masters in a foreign port for repairs, binds the ship itself. There can be no doubt that the material men and mechanics would have a lien on the vessel.

Though in the Roman law, from which, as is generally supposed, the maritime law adopted these privileged debts, the lenders of money to pay them only are mentioned, yet by a stronger reason the rule will apply to the original furnishers. *Emerigon Contrats, a la grosse*, c. 12, § 4. And as the master advanced this, I can see no reason why he should be placed in a worse situation than a stranger. Besides, by the general maritime law, and as it is received by all the maritime nations of continental Europe, this is the only pledge which the creditor has. The master's power to bind the owners is confined to the ship and her fruits, and he has none to bind them personally. *The Rebecca*, 1 Ware, 187. Besides, the peculiar nature of these privileged debts is to be taken into

account. The creditor, who trusts the thing rather than the person, is considered as parting with his property only on condition that the price is paid. Domat Liv. 3 Tit. 1, § 5, No. 6. He has therefore a *jus in re*, a proprietory interest, and the thing itself is hypothecated to him; and this hypothecary right can be lost only by his own laches. To this may be added that the libellant was in possession and had a lien for these repairs by the common law, and this lien I'hold may be enforced by the admiralty.

When the disasters happened that rendered these repairs necessary, Fall, who was joint owner, assigned his share to a vendee, who at the argument was stated to be insolvent, and this statement was not denied. If the part owners are not personally liable, and the ship is not, she will come to the vendee with all her reparations unpaid for by the new owners. This, I think, the maritime law will not allow. The master may apply the owners' part of her earnings in his hands. This is the freight of the ship, deducting expenses. For the ship is entitled only to her net freight after all expenses are paid. He may also retain the possession until repaid these expenses by her freight. But my opinion is, that he is not obliged to this slow mode of reimbursement, but may resort to the ship herself.

But it is objected that this is a libel against a part of a vessel, and it is said that there is no precedent in the books of a libel, in such circumstances as this case presents, against part of a vessel. But if a suit in such a case will lie against the entire vessel, I can see no grounds in principle, expediency, or convenience why it will not lie against a part. The reason for it is the same and the course of proceeding the same. A share or part of a vessel may be sold as well as the whole, and nothing is more common than for vessels to be held in shares. The want of a precedent may be a good reason to put us on a careful inquiry into the principles of the law, but cannot be a conclusive objection against the suit. It was observed by Lord Mansfield, nearly a century ago, that the law consists of principles and not of cases. And if this could justly be

said in a court of common law, the remark will, with more reason, apply to the admiralty which administers the laws on enlarged principles of liberal equity. Its mode of proceeding, also, free from the artificial niceties of the common law, accommodate themselves to the substantial justice of the case. The jurisdiction of the court is indeed limited to a particular class of subjects, such as are of a maritime nature, but within the limits of that jurisdiction its movements are free, neither servilely subjected to the leading-strings of decided cases, nor restrained of its natural liberty by the shackles and chains of unyielding technicalities.

Another objection, not so easily overcome, is that the libel necessarily involves a settlement of accounts, and that the admiralty has no jurisdiction over matters of account. The libellant took the vessel on shares, a certain portion of the earnings of the vessel, deducting certain charges borne in common by the owners and employer, to be paid over to the owners, and the rest to be retained for his own use. If expenses were incurred in the course of her employment, which under the contract were chargeable on the owners, the proper fund for the payment of these charges, was that portion of the vessel's earnings remaining in his hands that belonged to the owners. Now if she was liable *in specie* for these charges by a libel *in rem*, she would only be liable for the balance after appropriating the funds in his possession arising from her earnings, for it was his duty to appropriate these before resorting to the vessel. It is, therefore, plain that if a decree passes against the vessel, an account must be taken. It is admitted that the admiralty has no jurisdiction of matters of account as such, though they arise exclusively out of maritime transactions. *Steamboat New Orleans* v. *Phebus*, 11 Peters, 175; *Minturn* v. *Maynard*, 17 How. 477. But to hold the admiralty cannot look at an account which arises incidentally in a case over which it has jurisdiction, and determine the balance, is a very different question. Scarcely a suit is commenced by seamen for wages or by material men for labor or materials in building or repairing a vessel, which does not

bring in an account in offset of payment made on account. It was never doubted that the admiralty might allow the offset, and give judgment only for the balance, without sending the owners to another court to recover back their advances.

When it is said that the admiralty has no jurisdiction over matters of account, the meaning I understand to be,—First, if the settlement of the account is the sole object of the suit, it is clear that the court has not jurisdiction, although it might have over each particular item. Secondly. When it is not the sole object, if it is apparent from the pleadings that this is one principal object, though not the sole one, and the accounts are long and intricate and multifarious, the court will decline to take jurisdiction. It will not, as observed by Lord Stowell, allow its jurisdiction to be used as a peg to hang a case upon which properly belongs to another forum. When the account arises incidentally it has been pointedly said, that the court holds itself bound to move within restricted limits. But it is very clear that the jurisdiction is not included by the simple fact of there being cross demands. In all cases where there are such incidentally arising in a case, it is a question addressed to the sound discretion of the court, whether it will take cognizance of the case or not, and to be determined by the general principles before stated.

The present case demands no laborious examination of various and perplexed accounts. All the account to be taken is that of the earnings of the vessel for the benefit of the owners and the payments that have been made in the course of about one year. This, in my opinion, is quite insufficient to exclude the jurisdiction of the court. It is an account that may be adjusted just as well by a libel in this court or an action of assumpsit at law, as by the tedious and expensive process of a bill in equity, and with much less expense of time and money.

My opinion, on the whole, is that the court has jurisdiction, and that the pleadings set forth in the case entitle the libellant to relief.

This decree was reversed in the Circuit Court on the ground that a part owner has not a lien on the share of his tenant in common, for advances and disbursements.

NOTE.

The Noxal Action of the Roman Law.

Another view may be taken of this case which may be thought entitled to some consideration, and which leads to the same conclusion. The prime cause of all these disasters, was the unseaworthiness of the vessel when she started on her voyage. Now, it is a principle of natural justice incorporated into all systems of jurisprudence, that every voluntary and responsible agent shall be held answerable for damages caused by his own fault. The correlative rule, deduced from the same principle of universal justice, is that no one shall be responsible for an injury not caused by his fault or that of some one for whose acts he is responsible.

The Roman Jurisconsults, who were as profoundly versed in the philosophy of morals and the abstract principles of justice as they were in the positive laws of their own country, carried out these principles to their last results. By the noxal action the owner was responsible for an injury caused by the unlawful action of his slave. But when the will of the master did not concur with that of the slave in his act, as was ordinarily the case, he might exempt himself from personal responsibility by abandoning to the injured party the slave, or *noxa* as he was called, with his *peculium*, the private property of the slave, which custom and the humanity of the Roman masters allowed their slaves to possess. This followed the slave as an accessory. *Instit. Justin*, 4, 8, *in principio*. The same principle was applied to damages done by an animal. The owner could exempt himself from farther responsibility in abandoning the animal when no fault was imputable to him. *Instit. Justin*, 4, 9,

in principio; Dig. 39, 2, 7, 51. And following out still more vigorously the logical conclusion of the noxal action, the Jurisconsults allowed an abandonment when the injury was caused by inanimate things, as a building. When the owner left it in a ruinous condition, so as to be dangerous to neighbors and others who might be exposed to it in falling, the owner was liable for the damage, but he could withdraw himself from personal liability by abandoning the materials. *Rudera.* Dig. 39, 2, 6; Dig. 39, 2, 7, § 2.

With such curious logical consistency did the great Roman Jurisconsults follow out this radical idea, that the responsibility for damage should rest only on that which was the cause of the damage, that the analogy of the noxal action was carried into the prætorian action *damnum infectum.* When a building was in a ruinous condition, and by its dilapidation dangerous to a neighbor, he might have a prætorian action to compel the owner to give security for future damages. *Damnum infectum.* If the owner refused, the prætor put the petitioner in possession either of the whole building or such part as threatened damage to him. *Voet ad Pandectus*, 39, 2, 10. And when this possession was confirmed by a second decree, he substantially became the proprietor. He did not indeed acquire the *dominium civile* but only the *dominium prætorium.* But the prætorian or equitable dominion was a possession under which the absolute or civil dominion could be gained by usucaption or prescription. And by one of these fictions and subtleties, which so abound in the Roman law, he was presumed, under a second decree, to have had the possession under a just title, that is the prætor's decree, for the time which was required to perfect his dominion by prescription, and, therefore, under the second decree it became its own absolutely. Dig. 39, 2, 15, 516 *Voet ad Pand.* 39, 2, 12.

Toulier, the most learned commentator on the French civil code, and one of the most profound jurisconsults of the last age, says that the noxal action was founded in justice, and he quotes with

approbation the reason given for the limitation of responsibility in the Institute, *namque erat iniquam nequitiam eorum ultra ipsorum corpora Dominis damnoram esse*, Int. 4, 8, 2.

We find something like the principle of the noxal action in the original elements of the maritime law, in the limitation of the responsibility of owners to their interest in the ship, and her accessory the freight for any damage occasioned by the fault or insufficiency of the ship. The maritime law, from considerations of public policy, and in the interest of navigation and maritime commerce, extends the principle, and limits their responsibility, also, to cases of damage arising from the acts of the master or any of the ship's company, to the same measure. In all this, so far as it follows the principles of the noxal action, there seems to be at least a specious semblance of natural justice. If an owner lets his ship by a charter party, knowing her to be unseaworthy and unfit for the voyage, he may justly be held responsible for all the consequences on the ground of fraud. But these defects of vessels are often latent and unknown. It then seems neither to be unnatural nor unjust, that the employer should take some part of the risk.

The just and natural consequence of such a limitation of a creditor's right and remedy to a particular part of the debtor's property, is to give him a lien and preference against that property, over all other creditors. This is done by the maritime law in the most direct and simple mode, by allowing him to proceed *in rem*, and to take the thing itself into custody for security. In the Roman law this lien on the thing, if in that law it may be so called, was enforced in a more indirect, circuitous and inconvenient way. There the party injured brought a personal action against the owner, according to the nature of the tort or *delictum*, and the owner might either pay the damages or abandon the slave. But though the noxal action followed the delinquent slave into the hands of a new master, if he had been transferred, yet there does not appear to be anything like a direct lien, amounting, as in the maritime law, to a tacit hypothecation. Inst. 4, 8, 6.

In this case, as the damage was caused by the fault or insufficiency of the ship without any absolute fault of the owner, by the principles of the noxal action, he might abandon the ship and freight for the damage, and, by the principles of the maritime law, these became hypothecated for an indemnity.

THE CLARA M. PORTER.

When a vessel comes down with the wind free in an open sea, to speak another vessel which is close hauled on the starboard tack, the former has the entire duty of so manœuvring as to avoid a collision, and it is the duty as well as the right of the latter, in case a collision is apprehended, to keep her course.

If a vessel with the wind free attempts, without necessity, to cross the bows of a vessel close-hauled, and a collision takes place, the former vessel will be held *prima facie* to be in fault.

WARE, J. (holding the court for SPRAGUE, J.)

January, 1856. The schooner Jenny Lind, a vessel of about eighty tons burthen, duly licensed for carrying on the codfishery, sailed from Southport, in Maine, on the 4th of April, fitted out for a fishing voyage on the Bank fisheries. On the 5th of May, near Sable Island, while pursuing the objects of her voyage, and having on board two hundred and seventy quintals of fish, being then under sail, close hauled to the wind on her starboard tack, she saw a sail ahead at the distance of one-and-a-half or two miles, which proved to be the Clara M. Porter. The Jenny Lind was sailing on a north-westerly course, with a six knot breeze from the north-east, and the vessel seen was sailing nearly, if not precisely, in an opposite direction on her larboard tack. She was seen from the Jenny Lind over her weather-bow, and consequently the line on which she was sailing was to the windward. The vessels being under sail, on lines nearly, if not exactly, parallel, the Clara M. Porter would have passed to the windward. But soon after she was seen, she changed her course, put off before the wind, and came down with the intention of crossing the line of the Jenny Lind and speaking her at the leeward. From some miscalculation or mismanagement in one or the other vessel, or in both, instead of passing the Jenny Lind, as she intended, she came directly in collision with her, striking her amidships, head on, and damaged her

so severely, that within half or three-quarters of an hour she sunk. Her crew saved themselves by escaping on board the Clara M. Porter.

The Jenny Lind being close-hauled on her starboard tack, had, by the well-known law of the sea, the right of way. She had not only a right to hold on her course, but ordinarily, when a vessel, thus close-hauled on this tack, sees another sail approaching, with the wind free, and there is a possible danger of collision, it is her duty to hold her course, and it belongs to the vessel having the wind free to keep clear of her. In this case, the Clara M. Porter, having the entire command of her motions, and with ample sea room, if there had been danger of meeting, was bound to give way and avoid it. The collision would have been avoided if she had held her course, which would have carried her to the windward. If she wished to speak the Jenny Lind, she should have changed her course only so far as to have passed her within speaking distance at the windward, and then have crossed her track astern, if that was her object. The danger of collision would then have been avoided. Instead of this, she attempted the experiment of crossing her bows. It requires but little nautical experience to inform us that this is a hazardous manœuvre, which ought not, in ordinary cases, to be attempted. If it is, without something like a necessity requiring it, and a collision is the consequence, the party making the attempt must be held *prima facie* in fault. In this case, with a fair and moderate breeze, and an open sea, no such necessity could exist.

It is admitted in the argument for the respondent, that the Jenny Lind had a right to hold her course, and it is argued that if she had done so, the Clara M. Porter would have crossed her line ahead safely and passed to her lee; but it is contended that the Jenny Lind, instead of holding on her course, first bore away before the wind and then luffed back into her first course, and that the collision is to be ascribed to this cause; that she was in fault, first, by deviating and bearing away, and again, after doing this,

in luffing back. The argument proceeds on the ground that the Jenny Lind was bound to hold her course. This is the important and turning point in the case. If the Jenny Lind did what was imputed to her, it being her duty to hold her course, it is contended that the collision must be ascribed to her fault, and if the counsel is correct, even admitting that the Clara M. Porter was in fault in attempting the hazardous experiment of crossing the bows of the Jenny Lind, the collision must be considered as having been occasioned in part by faults on both sides. If so, then according to the recent decision of the Supreme Court in the case of *The Schooner Catharine* v. *Dickinson*, 17 How. 170, the loss is to be equally divided between the two vessels. Such, also, is the rule of the English admiralty. *The Monarch*, 1 W. Rob. 26; *Hay* v. *Le Neve*, 2 Shaw's Appeal Cases, 891.

The evidence on this point is conflicting. The two principal witnesses for the libelants are Silas Orne, the master, and Baker Orne, his brother, and the mate, both part owners of the Jenny Lind and parties to the suit, and admissible as witnesses in such cases only from necessity. But both of them were on deck, Baker having the helm, and both in situations in which they must have known whether their vessel was put off before the wind or not; and they both swear positively and directly that she was not; that she had, for a considerable time before the Porter was in sight, been on that course, and that it was at no time changed. The captain states that he several times hailed the Porter, and this is confirmed by Captain Woodbury, to put her wheel down and luff, but though she seemed to change her wheel back and forth, no change was made in her course. Most of the crew of the Jenny Lind, just before the collision, were below at dinner, and on hearing the captain hail they hurried on deck. Their statements on this point are, consequently, not so clear nor so much to be relied on, but as far as they go, they fully confirm the testimony of the master and mate.

On the other hand, Captain Woodbury, of the Clara M. Porter,

says, that when he was coming down before the wind, at twice hailing distance, the Jenny Lind appeared to put off, and fearing a collision, he put his wheel down; that he heard the hail from the Jenny Lind to put his wheel down, but that it was then hard down, and that the Jenny Lind, after bearing away, appeared to him to come to. Stewart, an experienced seaman on the Porter, says, that he saw the Jenny Lind on the wind, and that if she had kept her course, the Porter would have passed ahead of her, or she would have come into us; but that she kept off, and then he feared a collision. Foster, who was at the helm of the Clara M. Porter, says, that after they approached the Jenny Lind, coming down before the wind, she put off more free; that he intended to cross her bows, and come under her lee. These witnesses confirm the testimony of Captain Woodbury, that the Jenny Lind, as they approached her, put off more before the wind, but none of them say, that after she put off she again luffed back into the wind. Now, if the Jenny Lind put off more before the wind, and the Clara M. Porter was also before the wind, the latter vessel, if she came in collision, must have struck the Jenny Lind obliquely. But she, in fact, struck her head on, perpendicularly. The only way by which the manner of the collision can be explained, if the Jenny Lind went off before the wind, is, by supposing that she came back again as stated by Captain Woodbury. But there is, it appears to me, an intrinsic improbability in this supposition. If it was done by the Jenny Lind shortly before the meeting, as it was, if at all, it would only make the collision more dangerous, by converting an oblique into a perpendicular collision. Besides, if I have the testimony of the witnesses correctly, no one of them confirms Captain Woodbury in this particular.

The testimony of the two Ornes is fairly open to the observations made upon it, as coming from deeply interested witnesses. But similar remarks will apply with about the same force to Captain Woodbury, who feels as strong an interest in justifying himself to his owners; and will also apply with diminished force to all

testimony on one side and the other. The crews of each vessel probably had a natural inclination to find their own vessel clear of blame.

There then remains the testimony of the witnesses from the Tamerlane. At the time of the collision, and for some time before, the Tamerlane was from half a mile to a mile astern of the Jenny Lind, the latter being a point or a point and a half on her starboard bow, and sailing on the same course. Her crew were all, or nearly all, on deck, and the depositions of three of them have been taken by the libellants. They state that they were on deck observing the two vessels in plain sight, with a full opportunity of noticing their movements. They were so situated, sailing nearly on the same line with the Jenny Lind and almost directly astern, that if she had changed her course it could clearly be seen from their vessel. They all concur in saying that there was no change in her course, and fully confirm the testimony of her crew.

The Tamerlane was from the same port with the Jenny Lind; the masters and crews of the two vessels neighbors and acquaintances; and the counsel for the respondents has, with some reason, argued, that in a controversy between the owners of the Jenny Lind and strangers, their sympathies would naturally be with their townsmen and friends. Some deduction, it is supposed, ought to be made from their testimony on this account. I do not mean to deny that this circumstance might be entitled to some consideration, if their testimony consisted of minute facts, each of minor importance in itself, and deriving their importance from the combined effects of the whole, and from the coloring given to the facts. But their testimony is to a single fact, and one, which from their situation, they could observe and know, if not with absolute certainity, at least with a pretty near approximation to it. To this fact their testimony is direct and precise. We are, then, reduced to the necessity of supposing that it is, if not certainly true, at least probably so, or of imputing wilful prevarication to the witnesses.

An attempt is made by the claimants to discredit the two principal witnesses for the Jenny Lind, her master and mate, by showing that they have, at different times, made declarations and admissions inconsistent with their testimony given in court. But this evidence does not appear to me materially to impair their credit, sustained as their testimony is by other witnesses.

My opinion, on the whole proof of the case, is, that the collision was occasioned by the fault of the Clara M. Porter, and the decree must be against her. The case will go to a commissioner to ascertain the amount of the damage.

R. H. Dana, Jr., for the libellants.

Bartlett and *Thaxter*, for the claimants.

BENJAMIN R. GIFFORD, LIBELLANT, *vs.* LEMUEL KOLLOCK.

Where a minor shipped for a whaling voyage, under the direction of his father, who furnished his outfit of clothing, the libel was rightly brought in the father's name.

A description of a whaling voyage, 'To the North Pacific ocean and elsewhere,' is a defective description. A contract for a voyage that has no termination of time or place, is a void contract.

If the usage of a particular port, or a particular trade, authorizes an interpolation of the port of departure as the port of termination, this must be qualified by another implied term, that the return of the vessel to her home port shall be within a reasonable time.

A whaling voyage is properly a cruise for taking whales, and does not include a trading voyage to dispose of the cargo after it is obtained.

If the master undertakes such a voyage, it seems that men engaged for the whaling voyage are not bound to continue in the vessel.

By the ancient maritime law, constituting the common law of the sea, desertion by seamen, during the voyage, works a forfeiture of all wages previously earned. But the law is not imperative. The court may take into consideration palliating circumstances, not amounting to a justification, and mitigate the penalty to a reasonable indemnity to the owners.

The only case of desertion in which the forfeiture is absolute of the whole wages, is when all the requisites of the statute have been strictly observed. Statute July 20, 1798.

January, 1856. The material parts in the case are stated in the opinion of the court.

WARE, J.

This is a libel filed by Benjamin R. Gifford, against Lemuel Kollock, of New Bedford, owner of the ship Alice Frazier, for the lay or share earned by his son, a minor in a whaling voyage. The description of the voyage in the shipping articles, it is agreed, was a whaling voyage to the North Pacific ocean and elsewhere. Young Gifford shipped September 10, 1851, being then between fifteen and sixteen years of age, and continued in the ship till

March 9, 1855, three years and seven months. On that day the ship being at Melbourne, in Australia, and it being the day before she sailed on her return to her home port, he deserted. During the whole period up to the time of his desertion, it is admitted that he performed his duties in an unexceptionable manner, and that his deportment was uniformly satisfactory to the master. Indeed, so well satisfied was the master with his conduct, as well as with his ability and fidelity as a seaman, that he was promoted from a foremast hand to be a boat-steerer, an office which, according to the usage of this trade, entitled him to an increased compensation.

The first objection to the libel made by the respondents is, that the suit is not rightly brought by the father, but that it should be in the name of the son, and that the recovery, if any be had, should be for his benefit. My opinion is, that this objection cannot prevail. The shipping articles are not produced, but it is proved that the son signed them, and that the father witnessed his signature. It further satisfactorily appears, that the father made the contract and all the arrangements for the voyage, furnishing his child with an outfit of clothing for a three years' voyage. There is no pretence of evidence that he renounced his paternal authority or rights, nor is there any show of proof that the son claimed to be an emancipated minor, and entitled to his earnings, but the contrary is clearly inferable from the whole evidence. A parent is not, on slight circumstances, to be presumed to abandon his right of control over his children during their minority; and while he performs his parental duties of providing for their support and education, he is entitled to the proceeds of their labor. My opinion is that the suit is rightly brought in the parent's name.

The second objection relied on, and this is the important question involved in the case, is, that whatever lay or share, which is in the nature of wages, might be otherwise due to the parent, all his son's earnings were forfeited by his desertion at Melbourne. It is not claimed that the statute forfeiture has been incurred.

But then it is said that, independent of the statute, a forfeiture is incurred under the common and ancient maritime law. It is certainly true, that desertion does, by the maritime law, work a forfeiture of all wages previously earned in the course of the voyage.* The reply of the libellant to this is in substance, a denial of the fact. It is contended that the voyage, according to the just interpretation of the contract, terminated *de facto* at Melbourne, and there can be no desertion after the voyage is at an end.

It is admitted that the voyage described in the shipping articles, was 'a voyage to the North Pacific ocean and elsewhere.' Whatever objection there may be to the vagueness of the term elsewhere, in the description of a common trading or freighting voyage, it does not seem to apply with so much force to a whaling voyage. Such a voyage may, perhaps, be properly enough described as a cruise on the high seas in search of whales. They must be sought where they are to be found, and, from their migratory habits, they are not always to be found in the same parts of the sea. The nature and object of the voyage does not admit of any particular description of the localities intended to be visited. But the objection in this case is of a different character. The voyage described contains no *terminus*. The enterprise for which young Gifford engaged, may be said to have been completed when the vessel was filled with oil. But the contract does not say when or where the voyage shall end. An engagement for a voyage that has no termination in time or place, cannot be a binding contract. Now, it is not denied that the cruise for whales, the enterprise for which Gifford engaged, terminated at Melbourne. Nothing remained to be done but to dispose of the cargo. But this constituted no part of the service for which the crew engaged. When the cargo is

*In all times since the revival of commerce in the middle ages, desertion has been held to incur a forfeiture of wages. *Consulate de la Mer*. c. 268. *Transl. of Baucher*. It appears from several chapters of the Consulate of the Sea, that in early ages the service of seamen was considered as in part, at least, a military service. Chap. 169 to 178. And by some of the old ordinances, desertion is punished with the severity of military law.

brought into port, it is the part of the owners to convert it into money and distribute the proceeds.

After the cruise was ended the vessel went to Sydney and Melbourne, in Australia, and at the latter port disposed of part of her cargo. It does not distinctly appear from the evidence, whether the object in going to these ports was to sell her cargo or to obtain supplies, but it seems that, at least in part, the object was trade. It is on this ground argued that the voyage properly terminated there. The enterprise, the object of the voyage, so far as the engagement of the crew extended, was accomplished.

It was stated at the argument that, in shipping papers of vessels engaged in the whale fishery, it is an understood term of the contract, that the voyage terminates on the arrival of the ship in her home port. If it is so, it ought to be so expressed. But supposing this term to be interpolated, it must in all fairness be qualified by another understood term; that is, when the vessel is full, and a return cargo is obtained, the vessel shall return to her home port with no unnecessary delay. If, on her return, she should touch at one or more ports on her way, and dispose of a part of her cargo without materially prolonging the voyage, a court might not readily hearken to a complaint on the part of the crew. But it is to be remembered that when the cruise is at an end, the seamen cease to earn wages; and that it belongs to the owners to dispose of the cargo for the common benefit of all interested. If the master deviates from his course home, and goes to a foreign port to seek a market for his oil, this is a departure from the voyage for which the seamen engaged. It is the commencement of a trading voyage. If he may deviate to seek a market in one port, it is difficult to say that he may not in two or more, and the period of service for the crew be indefinitely prolonged, without any addition to their compensation. This, it seems to me, would be such a breach of the contract on the part of the master, as would liberate the crew from their obligation to continue in the ship. But the evidence with regard to their stopping at the ports of Sydney and

Melbourne, whether it was a deviation from the course of the return voyage, and whether it was exclusively or mainly for the purpose of trade, is not so full and clear that I feel prepared to place the decision of the cause on this point.

But even in this question, admitting the construction of the contract contended for, that the termination of the voyage was the arrival of the vessel at her home port; and further, that there was no deviation that would excuse the seaman for leaving her, are the owners in a condition to enforce the forfeiture against the parent, under the general maritime law? The statute appears to be peremptory. If there is a wilful absence of more than forty-eight hours, and all the requisites of the statute are exactly complied with, the forfeiture is absolute. It is declared that the wages shall be forfeited, and it seems to leave no discretion to the court. Nothing short of a justification of the desertion, such as extreme severity or cruelty on the part of the officers, it seems, will authorize the court to decline to apply the forfeiture. But it is admitted that this case is not brought within the statute.

But the maritime law, as I understand it, is less imperious, and trusts more to the conscience and discretion of the court. Desertion, that is, leaving the vessel with the intention of abandoning it and not returning, works a forfeiture. Such is the general rule. But after a desertion, if the seaman repent and returns, the law is indulgent. It is then considered, not as a case of total forfeiture, but as one for compensation and indemnity to the owners for the loss of service; and the seaman is punished and the owners indemnified by a proper deduction from his wages. The law looks with indulgence on the faults of seamen when they are free from malignity, and arise from thoughtlessness, improvidence, and that want of consideration which is so characteristic of them as a class. In such cases it inflicts its penalties with gentleness and reluctance; and in so doing it will look to the conduct of the officers towards the men, as well as make some allowance for the habitual improvidence of the men. And this it will especially do, when such con-

duct may in any way have tended to produce the fault which it is sought to punish.

The libellant, the father, has, I think, just cause of complaint in regard to the conduct of the master towards this boy, in two particulars. The first is, that after the desertion, though he remained in port a day before sailing, he made no effort to find him and bring him on board. He knew him to be a minor, intrusted by a parent to his care, and whose conduct is admitted to have been exemplary through the whole of three years and seven months' service. Yet, so far as the evidence goes, he not only made no attempt to find the boy and bring him back, but did not even inquire for him.

The second fault of the master was in the unreasonable advances he made to the boy during the voyage. He knew, or ought to know that he was not earning wages for himself; or if he was ultimately to have them, that they were claimed by the father, if not for his own use, at least in trust for his son. Young Gifford was furnished with an outfit of clothing for three years, and he remained in the vessel but seven months longer. He could need but little for clothing, and yet the master has charged against him three hundred and fifty dollars. One hundred was paid to him at one time, and fifty at another. What reasonable cause could there be for such advances? It was quite impossible that they could be required for necessaries. And it should be further observed, that the very witnesses whom the owners rely upon to prove the desertion, that is, that Gifford left the vessel with the intention of not returning, also prove that the cause of it was, that he was afraid to go home and meet his father with such advances charged against him.

Whether advances to this amount are legally chargeable on the wages, in a suit by the parent and natural guardian, without some evidence to show that under the circumstances they were reasonable and proper, need not be considered in the present stage of the case.

The only question now to be determined is, whether, there having been an admitted desertion under the general maritime law, but not brought by the proof within the conditions of the statute, the court is bound to visit the offence with the penalty of a forfeiture of the entire wages; or whether, by the maritime law, this court has authority to take into consideration circumstances of palliation, not amounting to a justification, and mitigate the penalty to a reasonable and proper indemnity to the owners, for any damage they have sustained from the delinquency of the seaman. My opinion is, that the court has that power; and that the facts in proof make this a proper case for exercising it.* It seems to me to be unconscionable and unjust to mulct this boy, supposing him to have a substantial, though not a legal and technical interest in his wages, of the entire earnings of more than three years and a half laborious and dangerous service, for a fault, blamable indeed, but which was induced mainly, if not exclusively, by the improper conduct of the master. If, in consequence of the desertion, the owners have sustained any damage, as is suggested, the proof being produced, it should be deducted from the wages.

Mackie and *Cushman*, for libellant.

Eliot and *Stetson*, for respondent.

*Since this opinion was delivered, I have been favored through the politeness of the authors with the first volume of Blatchford and Howland's Reports, just issued from the press, containing the admiralty decisions of Judge Betts. It is an addition to our books of admiralty jurisprudence of very great value. The extensive learning and great experience of Judge Betts, give to his opinions a commanding authority. I find that the principal question involved in this case, has been repeatedly decided by him, that the only case in which it is imperative on the court to pronounce for an entire forfeiture of wages, is when the desertion is proved precisely acccording to the requirements of the statute. *The Cadmus*, 142; *The Martha*, 155; *The Elizabeth Frith*, 201; *The Union*, 555.

STEELMAN, LIBELLANT, *vs.* TAYLOR.

Quære, how far the responsibility of a master of a vessel, for the accuracy of the accounts of the lading and delivery of a cargo, may be affected by the usage of a particular trade.

In a common contract of affreightment, the master is entitled to full freight on al the goods laden and borne on the bill of lading, though they may be by natural causes, and without his fault, deteriorated in quality, or diminished in quantity when delivered.

March, 1856. The material facts in this case are stated in the opinion of the court.

It was argued by *J. A. Loring*, for the libelant; and *Mackie*, for the respondent.

WARE, J.

This is a libel for freight claimed to be due on a cargo of coal, shipped at Philadelphia in the schooner Mesrole, for Fall River. According to the bill of lading, one hundred and nineteen tons were laden, while but one hundred and ten and a fraction $\frac{104}{2240}$ were delivered, the delivery falling short nearly nine tons; the consignee refuses to pay freight for more than was delivered, and claims to charge against the freight on the one hundred and ten tons, the price of the nine tons short delivery. It is stated by Mr. Dunn, a witness examined for the respondent, that there is usually a loss of about one per cent, on hard coal, like this cargo, by the degradation and waste of the coal in loading and unloading. But making this allowance, there will still remain a deficiency of about seven and a half tons.

It was not questioned at the hearing but that all the coal that was actually laden at Philadelphia, was delivered at Fall River; and the difference between the two accounts of the lading and the

delivery, can only be explained by an error in the one account or the other; either there must have been an overcharge in the account of the lading, or an error the other way in the amount of the delivery.

To prove the correctness of the bill of lading, the master has taken the depositions of two witnesses at Philadelphia, Myers, the superintendent of the wharf where the coal was taken into the vessel, and Kennedy, the weigh-master, who weighed it and kept the tally. The coal was brought to the scales in barrows, where it was weighed, and thus transported to the vessel in the barrows. Each barrow contained two hundred and twenty-four pounds when it was passed into the vessel. Kennedy noted each one as it was weighed in his tallying. This was kept in a book used for that purpose, and a copy of it is annexed to his deposition. The number of barrows marked gives one hundred and twenty-three and a half tons, in which there were four and a half tons of waste and screenings, and these being deducted leave one hundred and nineteen tons net. This was the only account taken. The mate was on board the whole time, and the master occasionally, while the coal was taken in, which occupied the time from eleven, A. M., to four, P. M. It is ordinarily the duty of the mate to take the account of the cargo as it is received; but if he neglects to do it with the master's knowledge, the master must be held responsible for the correctness of the account, by whomsoever it is taken, as he, in the bill of lading, adopts it. In this case the account was taken by the servant of the vendor or consignor. If there was an error in the account to the amount indicated by the delivery, it is quite clear that it must have been intentional and fraudulent. It could not have been accidental.

The cargo was delivered at Fall River from the vessel into carts. It was suggested that there was a loss of coal in swinging the bucket from the vessel to the carts, by the dropping of coal into the dock. But the loss in this way could have been but a trifle. The carts when loaded were taken, by the direction of the consignee,

to Cook's scales, there weighed, the account taken, and then carried to Taylor's coal-yard. The delivery occupied one day and part of another. Taylor engaged Macomber to receive the coal in carts, and Macomber employed six other teams. The depositions of six of the seven teamsters have been taken by the respondent, and they say that all the coal taken by them was weighed at Cook's scales. One of the carters and owners being out of the country, the respondent has not been able to obtain his deposition. Mr. Dunn, the regular clerk to take the account of coal weighed at these scales, was absent at the time of the delivery of this cargo, and the account was taken by three different persons of different portions of the cargo. While the cargo was being weighed and delivered, coal was brought from the yard for consumers, and weighed at the same scales. And it may be further remarked, that there is no positive evidence that the coal taken by Lowney was weighed at these scales.

From this account of the loading and delivery, it appears to be altogether most probable that the error was in the account of the delivery. From the change of the weighers at Cook's scales, of loads from the vessel, and the intermingling of loads for delivery to consumers, an error may be easily supposed to have been made without any imputations of fraud; while if so considerable an error was made at Philadelphia, it must have been fraudulent. A court is more ready to suppose a mistake than fraud, and if the decision is to be by the balance of probabilities, it must be in favor of the master.

But there are other considerations that belong to the case. The master is bound to see not only to the receiving personally or by his agent, but also to the proper delivery; he must at his peril deliver it to the consignee named in the bill of lading. But the consignee has also a duty to perform. When he is notified, he must seasonably be on the wharf to receive his goods. Mr. Taylor came there in the morning after the vessel arrived, and sent his teams.

The delivery to the teamsters was a delivery to him. Lowney,

as well as the others, was in his employment. And if he, as was suggested, may have carried his loads to another, and not to Taylor's yard, though this is certainly not probable, the loss must fall on Taylor, for the master was discharged by a delivery to his teamster.

The principal doubt that I have felt in this case is, whether the master took all that care to see to the accuracy of the account taken, both of the lading and delivery, which is required by law, and by the usage of this trade. If he did not, and the account shows a short delivery, my opinion would be that he must suffer for it, and that his claim for freight must be limited to the amount which he shows to have been delivered. In this case the discrepancy between the two accounts and the uncertainity as to the true amount of the cargo, must be imputed to his neglect. No evidence was offered to a common usage in this respect. It may easily be believed, that much less care is required in the delivery of a cargo of coal, than of a cargo of goods in bales and boxes, the value of which is great in proportion to their volume and weight. In the absence of all proof, I shall take it for granted, that, in this trade, it is usual for the parties to trust to the common weighers and tally men employed at each end of the voyage. In this case, I find it stated by one of the witnesses, that the coal was carried by Taylor's order to Cook's scales to be weighed. If the custom is as I suppose it to be, no satisfactory reason occurs to my mind why one party should, more than the other, be held responsible for the accuracy of the accounts. It is not pretended but that all the coal that was laden was in fact delivered; and if there is no reason for supposing fraud, there can, I think, be but little doubt that the error was made in the account of the delivery. The master is therefore, I think, entitled to full freight, according to his bill of lading. I have little doubt that this decision meets the justice of the present case, but I do not feel quite so much confidence, that it may not relax too much the obligation of the master, as to his care in seeing to the correctness of the accounts of the lading and

discharge of his vessel. This obligation may be more or less stringent, according to the nature of the cargo; and it may be more or less affected by the customs of a particular trade. There is no other evidence as to the custom of this trade before me, than what results from the general testimony in the case, and I infer that the coal was received and discharged, and the account taken in the usual manner.

A question was raised on the testimony of Mr. Dunn, who states in substance that, when coal of this kind is accurately weighed, there will be a loss in the delivery of about one per cent; on this cargo a loss of one and one-fifth of a ton. If the question fairly arises in this case, it is argued that freight is due only on the amount delivered, and assuming the account of the lading to be correct, that freight should be allowed on one per cent less. I think otherwise. It has been a question, when goods from natural causes have become deteriorated in the course of the voyage so as to be worthless, whether the consignee may not abandon them for the freight. And it has been held by authors of high authority in maritime law, that he may. But the better opinion, I think, and that supported by the better reasons, is, that he cannot, and that in such a case, the master is entitled to full freight on all that is laden. The loss is not attributable to his fault, but to the intrinsic vice of the goods, and by the principles of natural law, the loss falls on the owner. *Res perit domino.* And this decision is conformable to the principles of the contract of hiring. The engagement of the carrier is to transport and deliver the goods. This is the whole of his obligation, and this he has performed so far as depends on him, whether the merchandise is in good condition, or is degraded and deteriorated from natural causes, over which he has no control, and for which he is not responsible. For a like reason in this case, the master is entitled to freight on the whole quantity laden, if it has not been diminished by his fault.

I allow freight for the whole amount borne on the bill of lading, according to the terms of the contract. A claim is made in the

libel for three days' demurrage, occasioned by this controversy about the freight. This claim strikes me as a novelty; but, however that may be, I think it ought not to be allowed in this case.

THE YOUNG MECHANIC.

The act of Congress of March 3, 1847, regulating costs in admiralty proceedings *in rem*, where less than a hundred dollars is recovered, is repealed by the act of Feb. 26, 1853. The process Act of July 12, 1813.

Joinder of Parties. In suits *in rem* all persons having claims of a like nature against the thing, may join in a single libel for the purpose of having that question decided, whether the claims arise from tort or contract.

When a vessel is arrested by a lien creditor, all other such creditors may intervene by summary petition without having the vessel arrested again, and have their claims allowed.

Quære. When the vessel is delivered on a stipulation for her full value, whether such creditors may have the same remedy on the stipulation that they have against the vessel remaining in the custody of the court.

February, 1856. In this case, several libels were filed against the vessel while on the stocks, and before she was launched, by material men claiming a lien under the law of the State. The claimant, for whom she was built, had advanced large sums of money to the builder from time to time while the work was in progress, for which he had taken a mortgage of the unfinished vessel, and finally, before she was completed, had taken a bill of sale. A few days after the bill of sale was executed, the builder died insolvent, and the material men commenced suits to enforce their liens. It was contended on the part of the claimant, that the liens were all defeated by the death and insolvency of the builder, to whom the materials were furnished. The District Court decided against the claimant and in favor of the liens. In order to settle the question one of the cases was carried by appeal to the Circuit Court, where the decree of the District Court was affirmed. All the libels were then referred to a commissioner to ascertain the amount of each claim, and his report was confirmed by the Court,

and on motion of the claimants, the parties were heard in the taxation of costs.

Evans & Hovey, for the libellants.

Shepley & Dana, for the claimant.

WARE, *District Judge.*

Two of the libellants in these cases recovered less than $100 damage, and it is contended that under the act of March 3, 1847, Statutes at Large, vol. 9, p. 121, they are entitled to no more costs in the whole, than one-half of the amount of the debts or damage recovered; that being the rule established when the suit is *in rem.* And if that act is to be considered as now in force, it must furnish the measure of costs in these cases. But my opinion is, that this part of the act is repealed by the act of Feb. 26, 1853, Statutes at Large, vol. 10, 161. This act orders that 'in lieu of the compensation now allowed by law to attorneys, solicitors and proctors, &c., the following and no other compensation shall be allowed,' and then goes on to establish a general tariff of taxable costs. The fifth section repeals all previous laws, which are incompatible with the provisions of this act. And the act provides that on a final hearing in equity or admiralty, there shall be allowed to the solicitors or proctors a docket fee of twenty dollars, with a provision that if the libellant in admiralty recovers less than fifty dollars, the docket fee shall be ten dollars. The act does not distinguish between suits *in rem* and suits *in personam*, and being general must apply to both. The act of 1847 is clearly incompatible with this provision in the latter act, limiting as it does the costs in particular cases, and providing for a particular distribution of them inconsistent with the provisions of the last act.

Another objection to the allowance of full costs is of a more general character, and applies to all the libels. It is founded on the process act of July 12, 1813, Statutes at Large, vol. 3, 19. The second section of this act provides, where several libels are brought

against a vessel or cargo, which might be legally joined in one, that there shall be allowed no more costs than are taxable on a single libel, unless special cause for several is shown to the satisfaction of the court. This act, at least this part of it, does not appear incompatible with the act of 1853, and is therefore not repealed by it. The argument is, that material men, claiming a lien under the Statute, may all, like seamen suing for their wages, unite in a single libel, and costs should be allowed only on one libel. This depends on the true construction of the act, and to arrive at that, the whole must be considered. Its professed object is to diminish the cost of judicial proceedings by preventing a needless multiplicity of suits.

The first section provides, that when several actions or processes are brought against persons who might legally be joined in one, the plaintiff or libellant shall recover costs only on one action, unless special cause is shown for more than one. This section contemplates several actions by a single plaintiff against several defendants who might be joined.

The second section is supposed to be applicable to these cases. The provision of this is that when several libels are brought against one vessel or cargo, which might be joined, costs on one libel only shall be allowed except on special and satisfactory cause shown. This section apparently contemplates the case of a single and not of several libellants, and this appears to be evident from the clause that immediately follows, which provides that on libels against a cargo or parts of a cargo, which are seized as forfeited for the same cause, costs shall be allowed only on one libel, whatever may be the number of owners or consignees. There is nothing in the language of this section which leads to the conclusion, that where several persons have a like cause of action founded on a several liability to each, and not on a joint liability to all, they must join under the penalty of a forfeiture of costs.

It is the third section of the act which applies to cases like the present. That provides that when causes of a like nature, or in

relation to the same question, shall be pending before the court, it may make such orders or rules as to the course of proceeding as are conformable to usage, for the unavoidable delay and cost, and for that purpose order causes to be consolidated; and authority is given, where any attorney or proctor has multiplied processes unnecessarily and vexatiously, to require him to pay the costs himself.

The questions which arise under this section are, First, whether these libels could legally have been joined, and on this question my opinion is, that they might, and secondly, whether they have been so unnecessarily and vexatiously multiplied as to call for the application of the penalties which the act provides, and on this question my opinion is, that they have not.

A doubt was suggested, on the part of the libellant, whether these parties could unite in one libel, and an *obiter dictum* in the opinion of the court in the case of *Oliver* v. *Alexander*, 6 Peters, 146, is relied upon as sustaining the doubt. It is there stated *arguendo*, that this privilege, by which several persons, each having a separate and independent cause of action, are permitted to join in a single libel, is allowed as a special favor to seamen in suits for their wages and to them only. But the decision in the case of *Rich* v. *Lambert*, 12 How. 352, where this question was directly before the court, establishes the contrary doctrine. That was a libel against the vessel to answer for damage to goods, occasioned, as was alleged, by the improper stowage of the cargo through the neg ligence or fault of the master. The damaged goods belonged to fifteen different owners. Five of them united in one libel, and the other ten brought separate libels. In the progress of the causes, the court ordered them to be consolidated for the purpose of trying the general question involved in all, that is, the liability of the vessel. It was held, that in such a case, 'it is fit and proper that the proceedings should be joint, either by allowing the parties to unite in the libel, or by an order for consolidation, if separate libels have been instituted.' What was before allowed by the practice of the court, is now, by the process act of 1813, required under the penalties provided by the third section of the act.

It may be stated as a general rule in the admiralty, that when several persons have claims *in rem* against a single thing, whether arising from tort or contract, of a like nature and all involving one question, all may join in a single libel for the purpose of having that question tried, although, when that is settled, there may be special defenses applicable to each case. When the general question is decided, the case of each libellant becomes separate and independent, and is litigated on its own merits. But though they may, they are not obliged to unite, and if separate libels are brought this will have no influence in a hearing on the merits of the case, but unless satisfactory cause is shown for separate libels, it will affect the question of costs.

The question then presents itself, was there in this case satisfactory cause for separate libels. Without relying on the doubts, which might have been entertained from the novelty of the question, of the right of the different libellants to unite in one libel, or inquiring whether such doubts might constitute a legitimate reason, another cause is shown which must be held satisfactory. When the first libel was filed the ship was restored to the claimant on a stipulation, not for her full value, but for double the amount claimed in the libel. The second libellant was, therefore, under the necessity of arresting her to secure his own claim, and each succeeding libel was brought under the same necessity. It cannot, therefore, be pretended, that separate libels have been unnecessarily and vexatiously multiplied by the fault of the proctors.

If the ship had not been restored on stipulation, but had remained in the custody of the law, the other lien creditors might have presented their claims on summary petition and had them allowed without a new process against the thing; for that being in possession of the court a new arrest is unnecessary. In proceedings *in rem*, when the *res* is in the custody of the law, it is retained by the court *in usum jus habentium*, for lien or privileged conditions, who have *jus in re*, as well as for those who have a general or ununqualified *jus proprietatis* subject to these liens. In regard to

these privileged creditors, the thing itself is considered a debtor, and they may present their claims and have them allowed and paid from the proceeds of a sale. This is the familiar practice of the admiralty after a decree and satisfaction of the first libel, when there are remnants and surpluses remaining in the court. And I can see no reason, in principle or convenience, against allowing the same claims against the *res* before a decree, and such has been the practice in this district. *Hull of a new ship*, Daveis 196. (Ware, 103.) The rights of the creditor are the same against the whole as against the remnants. If the claims stand in different ranks of privilege they are marshaled and paid according to their priorities. If they hold the same rank they are paid concurrently, without regard to the time when the debt was incurred, or the time when the suits were commenced. *Privilegia non ex tempore aestimatur sed ex causa; et si ejusdem tituli fuerant, concurrant, liect diversitatis temporis in his fuerint.* Dig. 42, 5, 32. It is true that a distinction is made by the English court of admiralty, which will allow payments to be made from the remnants on claims, over which the court will not take jurisdiction in an original suit against the thing. But the distinction rests on no intelligible principle. It has been adopted only in obedience to the common law courts and under the duress of prohibition. It should not be followed in this country.

Whether, if the owner has the ship restored to him on a stipulation for her full value, the creditors may have the same remedy on the stipulation, that they have against the ship when that is retained in the custody of the law, is a question that has not, to my knowledge, been decided. No satisfactory reason occurs to me why they may not. The stipulation is a substitute for the thing. The owner is allowed to have the possession and use restored on his leaving an equivalent, and, having provided that, there is no reason why his possession should again be disturbed by lien claims existing at the time of the stipulation. If the whole amount of the stipulation is exhausted and paid, it amounts substantially to a

re-purchase of the vessel discharged of the liens. If any technical difficulty arises from the form of the instrument, this is an objection not favored in the admiralty, especially in the construction of instruments like this taken by order of the court in the interest of justice. *Lane* v. *Townsend*, Ware 286. At any rate it may easily be obviated by a slight alteration in the terms of the instrument.

THE ATTACAPAS.

Any vessel is not derelict until abandoned by the master, without an intention of returning and resuming the possession.

Principles on which salvage is allowed. Twelve hundred dollars given under the circumstances of this case.

March 29, 1856. The facts in this case are stated so fully in the opinion of the court, that no other statement is required. It was argued by *Jewett* for the libellants, and *Prince* for the claimants.

MASSACHUSETTS DISTRICT.

WARE, *District Judge.*

The Attacapas, a brig of about 149 tons burthen, sailed from Port Haven, on the North River, with a ship's company in all of five hands, on the 17th of November last, having a cargo of 238 tons of coal, bound for Bangor. Her ground tackle was good but her running rigging was indifferent, though thought to be sufficient for the voyage. On her passage down the river and through the sound, she met with a good deal of bad weather and leaked badly, requiring to be pumped once in half an hour, when the sea was rough, and once an hour in favorable weather. She stopped several times on her way, and in running down Cape Cod she came to anchor off Newcombe Hollow, in about three fathom water, Nov. 24, at about 8 o'clock A. M., the wind then blowing a gale. Another vessel at the time was lying near her, but, under the pressure of the gale, soon dragged her anchors and went to sea. The crew went below to breakfast, but soon finding the vessel drifting they let go another anchor. The condition of the vessel was now undoubtedly one of great danger. She was so deeply laden that in a smooth sea the water was within three or four inches of the level of her deck, and in rough weather it constantly washed over. In the high waves she was in danger of striking the bottom where

she lay, and her position was so near the outer sand bar, that the heavy ground swell might have carried her upon it with the wind, as it was off shore, and if it should haul out she would be very sure to ground on the bar. The master finding his peril, lying as he did on a treacherous coast, determined to weigh anchor and proceed to sea, but such was the strength of the gale, that the crew were unable to raise their anchors. It was then determined, for the safety of all, after putting the brig in the best condition to ride out the gale, to leave for the shore. The crew took out their clothes, bedding, and some other articles, and trusted themselves to the boat. In passing through the breakers the boat capsized and was destroyed, but the crew escaped to land, the mate badly wounded and two of the men slightly. Their clothing drifted on the beach.

This was between ten and eleven o'clock, and by this time, it being known that a vessel was lying off in distress, the salvors and a number of other persons were collected on the shore. Two of the salvors, Rich and Swett, took the master and crew to their house, gave them a dinner and furnished them with dry clothing. After dinner and again in the evening, the master and crew with some of the salvors, and at twelve o'clock, Rich, Swett, and some others without the crew, went to the beach, but such was the state of the weather that it was not safe to attempt to board the Brig.

From this time the evidence becomes contradictory, and, to a considerable extent, irreconcilably so. Without going into a critical analysis of the great volume of testimony, and without entering on a fruitless attempt to conciliate what is irreconcilable, or undertaking the invidious office of comparing and deciding on the credibility of conflicting statements, I will give what appears to me to be the fair result of the whole evidence.

The salvors with the master and crew assembled on the beach early Sunday morning, and the wind had now so much moderated that it was determined to board the vessel in a whale boat belonging to Rich. Rich took the command, and the boat being prepared, six persons, as many as it was supposed could safely go in

her, and among whom was Capt. Haskell, were arranged in their places ready for a favorable opportunity to pass the breakers. The orders were to jump in when the word was given. At that moment Capt. Haskell's attention was diverted to some person on shore, and as the launching of the boat was the work of an instant, he was left behind. But, after they had passed the breakers, Rich hailed Haskell and offered to go back in the boat and take him, but the noise of the water prevented his being heard. After boarding and examining the vessel Swett was left on board, and Rich, with the rest of the boat's crew, returned to the beach. At this time there were from fifteen to twenty persons, including the crew, present. Rich now proposed to return with a company of eight men and attempt to save the brig, but he said that having boarded her he should not give up his claim to salvage. The crew all declined, and of the whole company present only four volunteered to engage in the enterprise. Capt. Haskell, finding his crew failed him, now told Rich that he might take the vessel and do the best he could. He returned with four men who, with himself and Swett, six in all, with a good deal of hard labor, attended beyond doubt with considerable danger, after being prevented, by a change of the wind, from making Province Town harbor, navigated the ship to Boston and immediately gave notice to the owners in Salem.

The libellants claim salvage as for a derelict, but the vessel, I think, cannot be considered as a derelict in the strict and proper sense of the word. The master never abandoned the *spem recuperandi* until, his crew failing him, he consented to transfer his authority to Rich. The claimants, on the contrary, deny all right to salvage on the ground that the master was wrongfully dispossessed by the salvors, and that they obtained possession by a tort, not to say a crime. This ground of defence is entirely displaced by the evidence. The salvors, in my opinion, performed a highly meritorious service, and there was nothing in their conduct that should debar them from a fair reward. What that is, must be determined

by all the circumstances of the case taken in connection with the principles on which courts award salvage.

As the vessel lay Sunday morning, with the wind as it then was, leaking badly and the water ankle deep on deck, she had but a small chance of surviving the day without relief, and as the wind veered around in the course of the day it seems to be all but a certainty that she would be lost on the bar. The crew refused to go on board unless a new boat was obtained for the vessel. None could be obtained nearer than Wellfleet, and it was far from certain that one could be had there ready for the use of the vessel before the next day. Such appears to me to be the real state of the case as well as I can infer it from the great mass of testimony, often contradictory, and mostly coming from witnesses on both sides under influences that more or less sway the minds of most men, but some of it from disinterested and unsuspected sources.

That anything was saved for the owners, appears to me with a high degree of probability, was due to the salvors. That the attempt to save the vessel appeared at the time to be an enterprise of very considerable danger and hardship, I think, may be safely inferred from this, that out of about twenty persons present, all accustomed to the sea, only four could be induced, by the prospect of a salvage reward, to engage in the undertaking. The service, though laborious and hazardous, was not of long duration. They started from Newcombe Hollow in the morning and arrived at Boston the following night. The vessel was without provisions, and the personal expense of the salvors must have been something, and to these should be added the expenses of vindicating their claim, which has been strenuously resisted from the beginning. And a line of defense has been adopted by the claimants, which has not only led to expensive and protracted litigation, more than a week having been consumed at the hearing; but which, if sustained, would have seriously compromised the character of the salvors.

The general principle which governs courts of admiralty in awarding salvage is to give a liberal reward, not merely a compen-

sation *pro opere et labore*, but such a reward as will be an inducement to men accustomed to the dangers of the sea, to adventure on these perilous enterprises, by which not only property but often lives are saved. For saving life, at whatever risk, the courts can give no reward, for there is no common measure between life and money; but the merit of saving property may be measured by a pecuniary compensation. Another reason for liberality is to make the compensation such as will in some measure guarantee the honesty of the salvors, so that they shall not be tempted to pay themselves by the embezzlement of property left without protection; and farther, to ensure the good faith of salvors, embezzlement is always visited with the entire forfeiture of salvage. There is not, indeed, much danger of embezzlement of a cargo like this. But if I do not misjudge, there is another consideration belonging to this case that ought not to be overlooked. This vessel was rescued from the perilous shores of Cape Cod, a coast as much dreaded by mariners as the *infames scopulos Acroceraunia* of antiquity. For the interests of humanity as well as those of commerce, it is certainly desirable that the inhabitants of such a coast should understand, that if they will hazard their lives in relieving vessels in distress, they will not be dismissed with a parsimonious reward, such as will the next time put them to a calculation of the relative value of a gallant and hazardous salvage and the plunderings of a wreck.

There is, in all cases, a difficulty in holding the scales exactly even in salvage, and this is increased when it occurs on a dangerous coast where frequent losses happen, and where the inhabitants calculate to gain part of their living by acting as salvors of vessels in distress. They engage in the service for profit, and the roughness and dangers incident to the service, contribute to give them, together with the expectation of a reward, somewhat of a mercenary character, as well as one of gallantry. Habit comes in to make them put a low estimate on the personal dangers, both of the crew and themselves, compared with the expected reward. But

they never forget that, and the owners, though they might be generous when the danger is before them, when it is passed and their goods are saved, remember that what is saved after salvage is paid is saved for them.

The value of the vessel and freight are agreed to be $3,500, and, with these views, I have come to the conclusion to allow $1,200 salvage, with costs taxed against the residue of the vessel and cargo. The salvage is divided into fifteen shares and to be distributed as follows: To Capt. Rich, who was the leader of the enterprise, and furnished his boat for the service, four shares; to Capt. Swett, who was the first that boarded the vessel in the morning, three shares; and to the other salvors, two shares each.

THE BOWDITCH.

The master has a lien on the freight for his wages, and necessary disbursements for the use of the ship.

The seamen have a lien on the freight for their wages, and, in case of shipwreck, they have a lien on the savings of the wreck. They may have a further claim against the wreck in the nature of salvage, when it is saved by their exertion.

Butler, for the libellant.

Shepley, for the claimant.

April 7–10, 1856.

WARE, *District Judge.*

This is a libel against the owners of the schooner Bowditch, by the seamen for their wages. In November last, when the crew shipped, E. P. Talbot was master. He took the schooner on a verbal contract or agreement, to be employed in the coasting trade on shares; he, as master, to receive twenty dollars a month wages, and to be himself at the expense of victualling and manning, and, after deducting port charges, to pay over to the owners one-half of the net freight for the hire or charter of the vessel. The schooner sailed from Portland on the 23d of November, for Alexandria, with a cargo of plaster, and earned freight to the amount of $183.90, which, after deducting port charges and the master's wages, left a net freight of $123.72, one-half of which, to wit, $61.86, belonged to the owners. At Alexandria, after making some repairs, she took in a cargo of coal for New York, and on her passage to that port was wrecked and lost on Jones' beach, a beach about four miles from the shore of Long Island. The crew remained by the vessel, and faithfully labored to save as much as practicable from the wreck. The fragments saved

were afterwards sold in New York for $545.75, including $16.00 for which the hulk was sold as it lay. This, after the deduction of $70.69 expenses, left the net sales of the wreck, $475.06.*

Three-quarters of the vessel were insured by the Ocean Insurance Co. for $2,250, and the vessel being valued at $5,000 in the policy, this was three-fifths of the value of the three-quarters. The owners were duly informed of the loss and communicated the information to the underwriters, but made no abandonment, nor did the insurers claim to have or exercise any control over the savings of the wreck, or the proceeds of the sale, on the ground that there was a technical total loss. The proceeds were left in the hands of the commission merchant, by whom the wreck was sold subject to the orders of the owners.

The libellants claim wages against the owners. First, on the ground of their general liability as owners. Secondly, if this liability is denied, on the distinction that if the vessel was let to the master on such terms as constituted him owner for the voyage, on the ground that the owners have had the advantage of the freight received; and thirdly, on the ground that they have, at least, the constructive possession of the proceeds of the wreck.

It is an indisputable principle of maritime law, that the seamen are entitled to be paid their wages from the freight earned. Whenever this is earned, wages are due. Freight earned and put on shore is saved from the consequences of a subsequent shipwreck. It is in part the proceeds of their own service. In this case freight was earned at Alexandria, and though not paid over to the owners, was appropriated to their use in the purchase of a boat for the vessel and other repairs. And they being bound for the repair of the vessel, it must be considered as received by them.

The seamen have also a lien on the savings from the wreck, which gives them a priority over all other claims, except the expenses of salvage. The owners must be considered as having the possession of the proceeds of their savings. The master, who on

*See note at the end of the case.

such occasions is the agent of all who have an interest in the ship, put the fragments saved into the hands of a commission merchant, by whose order they were sold, and the proceeds of the sale paid to him. He holds the fund and is ready to pay over the amount to any party who is entitled to receive it. *Prima facie* this is the owner. He has not parted with his right by an abandonment, nor have the underwriters claimed to disturb his exclusive possession on the ground that they have an interest in the proceeds.

My opinion is, that the libel may well be maintained against the respondents on the ground, that they are in the possession of a fund pledged to the crew for their wages. As this is sufficient it is unnecessary to consider the other question of the personal liability of the general owners, when the vessel is let under such an agreement as this was. *Skolfield* v. *Potter*, Daveis, 393 (2 Ware, 394).

The libellants also claim, against the savings of the wreck, a further reward in the nature of salvage. The right of seamen to maintain such a claim, was presented some years ago to this court in the case of the *Dawn*, Daveis, 140 (2 Ware, 126). And after a very full and elaborate argument, I came to the conclusion that in cases of shipwreck, seamen were bound to remain by the wreck and render their best services to rescue the property from destruction; and that if this service was faithfully performed, they were entitled to their full wages out of the remains of the wreck, to the time of the disaster; and, according to the circumstances of the case, might be entitled to an additional compensation in the nature of salvage. This, as in all other cases of salvage, would be measured by the circumstances of danger and labor which attended the service, but that it ought in all cases to be sufficient to pay their expenses home.

NOTE.

It seems to be well settled in this country, that the master has a lien on the freight for his necessary disbursements for incidental expenses, and his liability for such expenses and also for his own

wages. Note to Abbot on Shipping, p. 147, and the cases there cited: 1 Ware, 149; 7 Cowen, 670; 3 Mason, 255; 18 Rich, 536 Though notwithstanding the decision of Lord King in *White* v. *Baring*, 4 Esp. 22, it is otherwise settled in England. *Smith* v. *Plummer*, 1 Barre, 4–575; Abbot on Shipping, 147 and 377, note. The reason given for refusing the master a lien on the freight is, that he has no lien on the ship for his wages and that the freight is incident to the ship. But the master is authorized to receive the freight, and if he has it in his hands he may pay himself, though he has no personal claim against the owners; for when there are cross demands it is only the balance that is due. See further as to the English law. Abbot, 656, note.

I have nothing to add to what is stated in the case of the Dawn, as to the right of seamen to claim as salvors. In the case of the Neptune, 1 Hagg., Lord Stowell seemed to limit their claim to that of wages. In that case the wreck was saved by the crew; but in the case of the Reliance, Sir S. Lushington held that their claims were good for wages against the wreck, though it was abandoned by them and saved by other parties. 2 Wm. Rob. 119.

UNITED STATES, BY INFORMATION, *vs.* THREE PARCELS OF EMBROIDERY.

In an information *in rem* for a forfeiture alleged to be incurred under the Collection Act of 1799, c. 22, § 66, it is essential to charge that the goods were entered under a false invoice, and that they were falsely invoiced with the design to evade the duties thereupon, or some part thereof.

Therefore, where such an information only alleged that the *entry* was made below the actual cost, with the design, &c., and the court instructed the jury that the invoice must be falsely made, and with the design to evade the duties, and the jury found for the plaintiffs, it was held that judgment must be arrested.

It seems that such an information should be brought in the name of the United States alone, without making the seizing officers parties.

DISTRICT COURT—MASSACHUSETTS DISTRICT.

June, 1856. The facts in this case are stated in the opinion of the court; it was elaborately argued, at a former day, by Hon. *B. F. Hallett*, District Attorney, for the United States, and *Milton Andros*, Esq., for the claimant. The opinion of the court was delivered June 11, 1856, by

WARE, *District Judge.*

An information was filed on the 4th of June, 1855, by the District-Attorney, against three parcels of embroidery, imported into the port of Boston from Liverpool, England, as subject to forfeiture, for a violation of the 66th section of the Collection Law of 1799, c. 22. It is filed 'in the name and behalf, as well of the United States as of Charles H. Peaslee, Collector of the port of Boston and Charlestown, in said district, and all other persons concerned.'

At the last term of the court the case was given to the jury, and they returned a verdict for the plaintiffs; a motion was then made,

January 2, by the counsel for the claimants, in arrest of judgment, for the supposed errors and insufficiency of the information, and several causes were assigned for the motion. The first, then, in natural order, though not in that adopted in the motion, is, that there is a misjoinder of parties. The form in which the information is presented, makes Peaslee, Collector, as much a plaintiff as the United States. By the 88th section of the act, it is ordered that, 'All penalties accruing by any breach of this act shall be sued for and recovered in the name of the United States of America.'

This is indeed an information *in rem* for a forfeiture, but I can see no reason for a distinction in this respect, between a suit *in rem* for a forfeiture, and a suit *in personam* for a penalty; and certainly when a statute peremptorily requires a suit to be in the name of a particular plaintiff, it would seem to be the intention of the legislature, that his name alone should stand as plaintiff on the record, and this inference would appear to be strengthened when that plaintiff is the United States.

The reason for making the Collector a party is presumed to be because he is supposed to have an interest in the suit, and the technical reason, on the general principles of law, would be strong for making him and other officers of the customs, who share in the forfeiture, parties, if they had an interest that was absolute and indefeasible. But their rights are precarious, and dependent entirely on the pleasure of the United States. Without their consent, their interest may be released at any time, even after judgment, and until the proceeds are paid over to the Collector and ready for distribution. *McLane* v. *United States*, 6 Peters, 404; *United States* v. *Morris*, 10 Wheat. 288. The technical reason for the joinder therefore fails.

By the general provisions and policy of the law, as well as by the practice of the courts, the seizing officers have no authority, nor are they allowed ordinarily in any way, to interfere in the management of the suit through its whole progress, from the begin-

ning to the end. There is, therefore, no reason for making them joint plaintiffs, but an obvious impropriety in doing so. When a forfeiture is ascertained and declared, it accrues in law to the United States. They receive it under the law, partly to their own use and partly as trustee for those who are entitled under the law. But this peculiarity is attached to the trust, that the trustee is not compellable to execute it, but may at pleasure remit the whole forfeiture to the claimant.

This view of the subject also seems to me to be confirmed by the general character of our fiscal laws. The sole purpose of the penalties and forfeitures with which they are so profusely studded, is the protection of the revenue. It is no part of their object, in a just and legal sense, to enrich the officers of the customs. The shares allowed to them are not allowed as a part of their compensation, in a legal sense. Their services are compensated by their salaries, and their shares of forfeitures are pure gratuities, given to quicken their diligence in the performance of duties for which they are otherwise fully paid. The promises held out to them by the law are, in theory, promises without consideration; mere nude facts, and therefore, on general principles, are not binding upon the promissors. And they are not only so in theory, but so held in practice. A gift becomes irrevocable only when executed, when the thing is delivered; and the right of the officers of the customs to their shares in forfeitures, becomes perfect only after they are paid over. There are, therefore, no reasons, so far as I can see, founded on general principles, why the seizing officer should be made a party plaintiff. There is a dictum in the case of *Gelston* v. *Hoyt*, 3 Wheat. 313, thrown out *arguendo*, that he may be a co-plaintiff. The question did not arise in the case, and it has not, therefore, the authority of a decision. The reason given for it is, that he has an interest in the case; but if I have a correct view of the law, it is not such an interest as entitles him to make himself a party; and if it be not, there is an obvious reason why he should not be clothed with the rights of a party to interpose in the man-

agement of the suit. And such appears to have been the course from the origin of the government. The direction of the first collection laws of 1789, c. 5, § 36, was, that suits for penalties, under that act, should be in the name of the United States. This was copied into the amended act of 1790, c. 35, § 69, and from that transferred to the last general collection law of 1799, c. 22, § 88.

The same direction is given in the registry act of 1792, c. 6, § 8, and in the act for enrolling and licensing vessels of 1789, c. 11, § 21.

But, however the law may be, the practice seems to have been various from an early time. In this district, it seems to have been customary for a long period, if not from the beginning, to join the Collector in a libel of information, with the United States, and there is a precedent in Dunlap's Admiralty Practice, p. 372, said to have a very high authority, which is in exact conformity with this information. In the district of Maine, the only one of which I have any particular knowledge, the practice, until quite recently, was to bring the suit in the name of the United States alone. The District-Attorney contends that the joinder is justified by long, if not immemorial usage, in this district, and that if in strict law it is open to objection, that the exception is declinatory in its nature, and is waived by going to trial on the merits, and cured by verdict. On the other hand, it is contended that the joinder being against the express words of the statute, the exception is fatal at any stage of the suit, before final judgment.

I do not, however, find it necessary to decide the case on this question, because there is another ground on which, in my opinion, the judgment must be arrested.

The other causes assigned for the arrest of judgment, and which have been insisted upon in the argument, may all be resolved into one, and that is, that the offence is not set out in the information with that clearness and distinctness which is required by the rules of pleading and the practice of the courts. It was long ago

held by the Supreme Court, that an information to recover a penalty under the collection act of 1799, is in the nature of a criminal proceeding. *Locke* v. *The United States*, 7 Cranch, 339; *Clifton* v. *The United States*, 4 How. 242. The description of the offence for which the penalty is demanded, must have the same kind and degree of certainity that is ordinarily required in other criminal proceedings. And although it may be true, as is argued by the District-Attorney, that in the practice of our courts, all that technical accuracy of description may not be required which is held to be essential in indictments, and even in the exchequer practice, in England; and that niceties need not be observed which rest on dry precedent, the reason of which has either ceased to exist or cannot now be discovered, it is still indispensable that every circumstance constituting the offence be clearly and distinctly set out in plain and direct averments. It is not sufficient to show, that a man learned in the law may find in the information, by comparing one part with another, a full description of the offence. It is, I apprehend, necessary that the offence be charged in such plain and positive terms, that a plain and unlearned man, *inops consilii*, may clearly understand, by reading the information, what is charged upon him, and to what he is required to answer, and so, also, that a jury equally unlearned, may understand, from the information, what they have to pass upon. Guided by these principles, let us first look at the law which creates the offence, and then at the description of it in the information.

The language of the law is, 'That if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof, at the place of exportation, with a design to evade the duties thereupon, or any part thereof, all such goods, wares, or merchandise, or the value thereof, to be recovered of the person making the entry, shall be forfeited.' It is very clear from this language that three facts must concur to complete the offence:

First, an entry must be made of the goods.

Second, they must be invoiced, not according to their actual cost.

Third, they must be thus invoiced, with the design to evade the duties thereupon, or upon some part thereof.

Each of these facts must be found to entitle the plaintiffs to a verdict, and all of them being necessary to constitute the offence, each should be plainly and distinctly charged in the information.

To ascertain whether they are thus charged, let us look at the nformation. I read all that part which is descriptive of the offence. The allegation is, that an entry of these goods 'was then and there (at Boston, May 26, 1855) made upon an invoice then and there produced, as and for the true invoice. of said goods and merchandise according to law, when, in fact, the said entry was so made upon said invoice, below the actual cost of said goods at the place of export, and said entry was so made under the true value and cost of said goods, with the design then and there to evade the payment to the said United States, of that part of the duties chargeable according to law, upon the cost and value of said goods, which was chargeable upon the excess of said actual cost and value according to law, over and above the reduced and false value, at which said goods were so entered, as aforesaid, the said goods, wares, and merchandise, being then and there imported into the United States from a foreign country, and being then and there liable to the payment of duties upon an entry upon an invoice according to their actual cost or true market value at the place of export.'

Now to complete the offence, there must be, undoubtedly, a corrupt design to defraud the United States in the duties, and there must be some act done towards carrying that design into execution; and it appears to my mind quite clear, that in order to bring the case within the reason of the law, this design must have existed at the time of making the invoice, and that the invoice itself must be prepared and concocted for the purpose of carrying that design into effect. The criminality of the fraudulent design is attached to

the making of the invoice, and not to the entry. The entry may be honestly made by an agent, who knows nothing of the fraudulent undervaluation; and if the forfeiture attached to the criminal intent in the entry, it might easily be avoided by keeping the consignee in ignorance of the actual cost. To prevent this, the law fastens the forfeiture to the first act in the series, by which the fraud is intended to be perpetrated, and by which it may be effected, though all the subsequent agents are innocent.

The case was so put to the jury, and they were told, before they could find a verdict for the plaintiffs, they must be satisfied not only that the invoice was false, but that it was made so with the design of defrauding the United States of the duties, or a portion of them. The jury may be presumed, under the instruction of the court, to have found the fact, although it is not distinctly charged in the information.

And I now come to the question, whether there is any sufficient allegation in the information, that the goods were not invoiced according to their actual cost, with the design to evade the payment of the duties, or any part thereof? And I think there is not. The information seems to have been framed on the idea that the forfeiture attached to the design of fraud in making the entry. The entry is charged to be made on said invoice, below the actual cost. What invoice is here meant?

It is described above as an invoice produced, as and for the true invoice. But it is not declared to be false, except by way of inference; again, it is charged that the entry was made with a design to evade the duties; but it is nowhere distinctly and plainly charged, that a false invoice was made with that design. Under this section of the statute, it appears to me that this design in making the invoice is an essential part of the offence. If it is so, the rules of pleading require that it be distinctly alleged. If it be said that the jury, under the direction of the court, found the fact, it is still true that by the strict rules of pleading in penal causes, the plaintiff can recover only according to his allegation as well as his proofs.

My opinion on the whole, is, that judgment must be arrested.

JESSE COFFIN, 2d, LIBELLANT, *vs.* JOHN H. SHAW.

A father shipped his son, a minor, under the age of seventeen, by a contract in the common form, for a whaling voyage to the Pacific Ocean and elsewhere. The son faithfully did duty during the whole period of his minority, and afterwards deserted before the termination of the voyage :—

Held, that the desertion did not forfeit the wages of the son during his minority, which were due to the father. The obligations of the father's contract terminated with his son's minority, and his responsibility for his acts ceased at the same time.

A simple promise, by one, of the act of another person who is *sui juris* is void. But a contract of guaranty or suretyship for the act of another, if on a sufficient consideration, is valid.

In this case no such guaranty being proved, it could not be presumed.

DISTRICT COURT—MASSACHUSETTS DISTRICT.

June 11, 1856. The facts in this case are stated in the opinion of the court. It was argued by *A. S. Cushman*, for the libellant, and *J. C. Stone*, for the respondent.

WARE, *District Judge.*

This is a libel brought by Jesse Coffin, to recover, against the owners of the ship Alabama, of Nantucket, the lay or wages earned by George M. Coffin, his son, in a whaling voyage described in the shipping-paper as a voyage to the Pacific Ocean and elsewhere. There is no controversy as to the facts in the case. It is admitted that George M. Coffin was at the time of the contract a minor; that he was regularly shipped by the libellant, his father, for the voyage, on the 26th of May, 1846, as a cooper; that his lay or wages was to be one seventy-fifth of the proceeds of the cruise; that he proceeded on the voyage, and faithfully and with full an ordinary share of ability performed the service for which he was engaged, and remained in the ship till the 21st of November, 1850, four years and within a few days of six months. It is also ad-

mitted that he then deserted, while the vessel lay at the Sandwich Islands, the voyage or cruise not being at the time completed. The cause or inducement to the desertion is proved by the libellant's own witness. Not long before that time the discovery had been made of the great mineral riches of California. The tempting prospect of sudden and easily acquired wealth was too strong for the young man, and he abandoned the ship for the purpose of seeking a fortune among the gold mines of this new El Dorado. He had no cause of complaint against the master or the vessel, and he deserted purely from motives of interest, on the calculation of finding a more lucrative employment. It was, therefore, a desertion not only without justification, but without palliation.

In every age of the maritime law, a wanton and wilful desertion before the termination of the voyage, has been held to work a forfeiture of all wages antecedently earned. In the case of *Gifford* v. *Kollock*, Law Reporter for May, 1855, p. 21 (ante p. 45), I thought, though this was the general rule, that the law was not imperative on the court to inflict the entire forfeiture; but when the desertion was attended by extenuating circumstances, not amounting to a justification, these circumstances might be taken into consideration, and the penalty mitigated to a reasonable deduction from the wages, or even to a case of mere compensation and indemnity to the owners for the actual damage sustained. Perhaps when the desertion is proved precisely according to the requirements of the act of 1790, c. 29, § 5, Statutes at Large, vol. 1, p. 133, it may be otherwise. It may be that the act makes it a statute penalty, and by its terms takes from the court all power of qualifying the offence, and reducing the penalty in consideration of palliating circumstances, that do not constitute a full justification. The facts of the case did not call for the expression of an opinion on that point. But to the doctrine held in that case, I still adhere. In the present, however, there were no extenuating circumstances. The desertion was not only without justification but without palliation.

But there is another admitted fact to be adverted to in this case,

and it is the only one that creates any difficulty in my mind. This boy was shipped by his father while he was a minor. During his minority he was earning wages for his father's benefit, and working out his contract. And while that continued, his father must be held so far responsible for his conduct; that any act in breach of the contract, which legally affected the right to wages, is imputable to him. But the desertion took place on the 21st of November, 1850, and the boy arrived at the age of twenty-one on the 17th day of the preceding August, and then ceased to be under the parental power. He then ceased to earn wages for his father, was entitled to his own earnings, and became alone responsible for his own acts. The shipping contract made by his father then terminated by operation of law, and up to that time there had been no forfeiture. The father had then acquired all the rights he could acquire under the contract, and as he had no longer any right of control over his son, he ceased to be responsible for his acts. How then could his rights be affected by any subsequent acts, or how can there be a breach of a contract that no longer existed, but which was dissolved by operation of law? It appears to me that there is but one possible condition of the contract by which he could be so affected.

It is a principle of common sense and natural justice, as well as of law, that contracts have their effects, both of benefit and burden of right and obligation, only between the parties. No one can stipulate or promise but for himself. A promise that another shall give a particular thing, or do a particular act, is simply void, conferring no right and producing no obligation. It is an exception to the rule, when the person whose act is promised is under the control of the promisor; as, if he promises the acts of a hired servant in his employment, the promise binds him as if he had promised his own act; or if he promises the act of a minor, being an apprentice or a child, as in this case. 6 Touiller, Droit Civil Francais, No. 136. The libellant, in his character of a parent, had the right of control over his son, and if he engaged, by this contract,

that his son should faithfully serve the owners as a cooper in the voyage, as he must be considered to have done, he will be equally affected by a breach of this engagement by his child as if he had promised his own personal act and violated his promise, and must bear the legal consequences of such violation. But his responsibility lasted only as long as his contract, and that terminated with his son's minority.

But though the simple promise of the act of another is merely void, and neither binds the promisor nor the person whose act is promised, by varying the form of the engagement, it may become binding on the promisor. The distinction is succinctly and clearly expressed in the Institutes of Justinian: 'If one promises that another shall give or do anything, he is not bound, as if he promises that Titius shall give five pieces of gold. But if he promises that he will take care or cause that Titius gives it, he is bound.' *Si quis alium daturum facturumve quid spoponderit, non obligabitur, veluti si spondeat Titium quinque aureos daturum. Quod si effecturum se ut Titius daret, sposponderit, obligatur.* Lib. 3, 203. He then promises not for another but for himself, and as persons are not presumed to trifle in business transactions with nugatory promises, a person will easily be presumed to mean by such a promise, that he will be surety for the one whose act is promised, when the circumstances are such as to favor the presumption or not to bring it into doubt. Pothier, Obligations, No. 56. In stating the general principle, that one can stipulate or promise but for himself, I have borrowed the language of the Roman law, because it is put there into a neat and succinct formula. But the general rule is as true in our law as in that of Rome, for it is founded in the nature of things. There are exceptions in both, but they do not reach the present case.

It was, doubtless, competent for the libellant to engage in the event that the voyage should not be ended when his son attained his majority, and to bind himself as a surety for him, that he should continue in the vessel and faithfully do duty until the final termina-

tion of the voyage, and to make himself responsible for any forfeiture his son might incur, and it is only by such an engagement that he could be affected by acts of his son after his parental authority ceased. The owners might have stipulated for such a promise, and it would have been binding on the promisor. But the circumstances must be peculiar to authorize the presumption of such an engagement without direct evidence, and surely it will not be presumed against probability. Are the circumstances of this case such that an engagement of this kind can fairly and reasonably be inferred? I think not.

To authorize such a presumption, we must suppose that the parties, at the time of the contract, contemplated the contingency that the voyage might not be completed until after the son had passed his minority. But more than four years of his minority yet remained, and it is agreed that the ordinary length of whaling voyages in 1846 was three years, and that they never exceeded four. The supposition is, therefore, not only without probability but against it, and there is no direct evidence tending to show that the possibility that the voyage might outlast the boy's minority occurred to the minds of either party. The case then stands on the naked facts and the law applicable to them. My opinion is, that the obligations of the shipping contract made by the father terminated, by the understanding of the parties, as they certainly did in law, when the son attained his majority; and that the rights acquired by the father, during his minority, cannot be affected by any act of the son after the parental authority terminated, and he became *sui juris*.

Decree for libellant.

NICKERSON, LIBELLANT, *vs.* THE JOHN PERKINS.
TROY, LIBELLANT, *vs.* THE SPEEDWELL.
MAHER, *vs.* THE ACORN.

June, 1856.

WARE, *District Judge.*

The disasters of these three vessels, which are the occasion of the present suits, happening at the same time and place, have so much in common that I have found it convenient, in order to avoid a repetition of the same circumstances, to consider them together, taking notice under the several cases, of the peculiarities belonging to each.

During the severely cold weather of the last winter, the ice formed very largely in the harbor of Boston, and along the shores of the bay, the whole way down to the extremities of Cape Cod. A large field of this ice lay off the harbor and in the Bay of Wellfleet, stretching several miles in length along the shore, and extending four or five miles into the sea. From various mischances and accidents, these three vessels, together with the Wyvern, a small fishing schooner, between the twelfth and fourteenth or fifteenth, got inclosed in this large and floating field, all in the same neighborhood. When once they found themselves inclosed, it became impossible to escape. And the intense cold continuing, the frozen field continued to increase, until it extended a mile or more beyond them, into the sea. They were entirely helpless where they lay, and the extrication of them became daily more difficult.

This field was not stationary, fixed, or firmly attached to the shore, but was during the whole time drifting forward and back with the wind and tide, to the distance of several miles, with the ebb and flow of each tide. Nor had it a smooth and even surface.

It was in various places from time to time, broken by the swell and surging of the water under the force of the wind and tide, and one fragment thrown over and piled on another until the mass, although the ice did not form on the water more than a foot in thickness, had become, from four and five to six or seven feet thick, and all firmly cemented by the frost into a solid body. This heavy and formidable mass, as it drifted forward and back with the motion of the water, carried all the vessels inclosed within it. No anchor could have held a vessel safely to her moorings against so large and heavy a mass. If the vessel was firmly imbedded, the anchor must drag, the ice give way, or the vessel be crushed. In this situation a vessel was generally safer with her anchor up than with it down. But if the surging of the sea broke up the ice about the vessel and left her in an open lagoon, then the anchor might hold, but without contributing much to her safety.

After the vessels had remained several days in this situation, driven at the pleasure of the elements with no prospect of immediate escape, and the danger increasing rather than diminishing, the crews became so uneasy and alarmed that they determined to leave for the shore, which was about four miles distant. The crew of the Wyvern, consisting of nine in all, left her Saturday, the 16th, with the exception of one man, Nickerson, who chose to remain by the vessel, rather than encounter the dangers of going on shore over the ice. Sunday, the 17th, the wind, which had been all the time fresh, increased to a gale, accompanied with a severe snowstorm, and the condition of all the vessels became one of extreme peril. About noon, the crew of the John Perkins all left her for safety, and went on board the steamer Acorn, with the intention of remaining in her the afternoon and night. She lay three-fourths of a mile or more from the Acorn. The crew of the Speedwell also came to the Acorn, she lying from her at the distance of but a few rods, and during the afternoon the men passed between the two vessels in safety, the ice being firmly frozen around them. There was a general consultation between the masters and crews

of the three vessels during the afternoon, on the condition of the vessels, and to determine what, under the circumstances, it was advisable to do. And the storm not abating in its violence, it was determined to leave for the shore. About five o'clock, the whole of the crews of the John Perkins and Speedwell, including the masters, left, and all the crew of the Acorn, except the mate, Maher, and Troy. Capt. Gibbs, of the steamer, determined at first to remain with his vessel, and he delivered his son, a boy about twelve years of age, to the care of his engineer, to take him ashore. But the boy had got but a few yards from the vessel when he became so alarmed that he refused to proceed without his father; and as it seemed that nothing could be done for the safety of the vessel if he had remained, the father can hardly be blamed for leaving her to accompany and save his child. The mate remained about an hour after the captain, and then he left; Troy and Maher followed about an hour after the mate.

Such is a general outline of the facts, as they appear from all the testimony, that applies to all the cases. A large part of it was taken in the case of Nickerson's libel against the John Perkins, which was heard and argued separately. But it was agreed, in order to save the time which would be required by a diffuse reëxamination of the witnesses, that it should be imported into the other cases.

THE JOHN PERKINS.

Any embezzlement of the saved property by salvors, works an absolute forfeiture of all salvage.

Embezzlement by other persons does not forfeit the right of innocent salvors.

But salvors are not only bound to strict honesty themselves, but while in proximity, are bound to take all reasonable care to prevent plunderage by others.

A slight neglect in this particular, will be considered in awarding the amount of salvage; and gross negligence may be followed by an entire forfeiture.

It is an entirely false notion of salvors, that in order to retain their lien on the property saved, they must retain the actual possession. This lien is a maritime lien that does not depend like a common-law lien, on possession.

A vessel was drifting in a field of broken ice, all her crew having abandoned her for the safety of their lives, and in imminent danger of coming in collision with another vessel at anchor, with one man left on board. The collision was prevented by cutting the cable, which, with the anchor, was lost.

Held, whether it was the fault or misfortune of the vessel to have been left by her whole crew, she was bound to pay for the loss of the cable and anchor of the vessel which had a man on board; as every vessel must bear the consequences of her misfortunes, as well as her faults; and that this might be recovered as salvage. But the vessel having contributed nothing of active service towards the safety of the vessel, could claim nothing further.

Though the sacrifice was equally necessary to the safety of the salvor vessel, under these circumstances the sacrifice was not a case of average and contribution.

The schooner Wyvern, a fishing vessel of about eighty-one tons burthen, with a crew of nine men in all, on the 12th of February, while attempting to make Provincetown harbor, was driven by the wind into this field of ice. The crew remained in her until Saturday, the 16th, when all of them, except Nickerson, for their personal safety, left her for the shore. He being an elderly man, and in rather feeble health, chose to remain in the vessel, rather than encounter the danger of passing over four miles of rough and broken ice to the land. The wind, which during the whole time had been fresh, increased on Sunday, and before night rose to a gale, accompanied with a severe snow-storm from the northwest. At that time, the John Perkins lay in a northwesterly direction from her, at the distance of a half a mile. During the latter part of the day, the violence of the wind broke the ice between the John Perkins and the Wyvern, so that there was an open sea, with only loose, floating cakes of ice. The Wyvern had her anchor down; but if that of the Perkins was also, the last drifted freely, and being abandoned by her crew, she was carried about in this open lagoon at the pleasure of the wind and tide, while the Wyvern's anchor held her fast. According to the account of Nickerson, the combined force of the wind and current drifted the Perkins directly down towards his vessel. When she was within about fifty feet, coming with her broadside directly on, so that if the Wyvern lay where she was, there must be an unavoidable

collision, to avoid the disaster, he cut the Wyvern's cable, and she moved off in such a direction, that the Perkins floated past her, and the next morning lay at a considerable distance to the south; the ice, by the increasing cold and the subsiding of the wind, then became fast around both vessels, and they remained in the places where they were Monday morning till Wednesday, when the crews of the two vessels returned from the shore.

Taking the account of Nickerson to be correct, there can be no doubt that a highly probable, if not a certain collision of the two vessels was prevented by the act of cutting the Wyvern's cable. Had it taken place under these circumstances, with but a single man to both vessels, it could not fail to have been disastrous if not fatal to both. It is for this service that the libellant claims salvage against the Perkins. There is, indeed, in the libel and in this testimony, considerable said about his keeping watch over her until her master and crew returned three or four days after. But nothing was done or could be done during that time, that contributed to her safety. She lay fixed fast in the ice, and only moved as that moved.

But there is some doubt, to say the least, thrown over the correctness of Nickerson's account of these events, by the testimony of the other witnesses. Sunday, in the afternoon, the captains and crews of the John Perkins and the Speedwell were on board the steamer Acorn, lying at no great distance from the Wyvern and Perkins. These witnesses, especially Capt. Gibbs, of the Acorn, carefully observed the movements of the vessels until five o'clock, when they left for the shore. Capt. Gibbs confirms the account of Nickerson, that the Perkins drifted, so that the vessels changed their relative positions. The Perkins, according to his observation, moved southwardly, and passed the Wyvern at a considerable distance from her, and so as not to come near a collision. But the Acorn lay at a considerable distance from these vessels, from a half to three-quarters of a mile, and during the whole afternoon there was a heavy and blinding snow-storm, so that it was only at inter-

vals when there was a little relenting of the storm that the vessels could be seen at all. One of the witnesses says that he saw her two or three times only. The most careful observations under these circumstances, could not be wholly relied on.

And it is further to be observed, that the movements of the vessel witnessed by Captain Gibbs and the witnesses of the Acorn, took place in the afternoon. The drifting, by which a collision was threatened, is stated, by Nickerson, to have been in the evening; and he puts it at so late an hour, ten or eleven o'clock, that the events could not be the same as those observed by Captain Gibbs. This supposition is, however, not free from difficulty. It is certain that the drifting of the Perkins was to the south, and Captain Gibbs says that when he left at five o'clock, the two vessels were nearly in the relative positions they occupied on the following Wednesday; so that if the observations made from the Acorn are entirely to be relied on, there must have been some irregular movements of the vessels to have brought them together at 10 or 11 o'clock at night. But even if those observations from the Acorn made from time to time, when the vessels could be occasionally seen through a blinding snow-storm, cannot be entirely relied on for accuracy, and making reasonable allowance for this, the two accounts supposing them to relate to the same time, are irreconcilable, and we are driven to the necessity of supposing them to relate to different times; or that the witnesses on one side or the other, have wilfully prevaricated. I am unwilling to adopt the latter part of the alternative, and rather conclude that both accounts relating to different hours, may be substantially true, a supposition which is not wholly improbable.

The claim of Nickerson to salvage must rest on his own testimony. He was the only witness to the service he performed, and, as in all salvage cases, he is admitted, from necessity, as a witness to support his own libel. His testimony is open to all the observations usually made on the credit of a voluntary witness swearing for himself with no one to contradict him, and, it was contended

in the argument, to some grains of additional suspicion from what was characterized as a manifest exaggeration of the perils of the vessels introduced into his libel. The libel is drawn by the proctor, and the libellants in salvage cases being often illiterate and ignorant seamen, are not, perhaps, always answerable, in the forum of conscience, however they may be in law, for every word that is put into the libel. There are, perhaps, in this libel, some averments which we might not expect to occur to such a man as specially important, which have somewhat the look of being the promptings of counsel, conversant with the law. The libel ought to be a plain, a clear narration of the events as they actually occurred, leaving the court to apply to them the law, and without interweaving something like the heads of an argument to support the case. These circumstances have been forcibly commented on by the counsel for the claimants, and though they may deduct something from the credit one would wish to give to the testimony, they are not enough, in my opinion, to justify the imputation of a deliberate perversion of the substantial truth. And if the libellant's story is substantially true, I think he is entitled to a salvage compensation from the John Perkins for preventing a collision of that vessel with the Wyvern.

But it is contended that whatever claims the libellant might othwise have had for salvage for his services Sunday night, it was forfeited by his embezzlement afterwards of articles from the vessel. He was on board the John Perkins several times between Sunday night and Wednesday morning, when her crew returned, and as he admits, took a quadrant and compass, and some other articles, and carried them on board the Wyvern, because, as he says, he thought they would be more safe there. If they were taken *animo furandi*, it would be an absolute forfeiture of all claim for salvage. Courts, from considerations of public policy, are in the habit of rewarding salvage services with a liberal hand. With this liberality, salvors must be content. Punctilious honesty is required on their part, and the courts will visit every embezzlement with the for-

feiture of all salvage. The quadrant and other articles taken by the libellant, were returned to the master when he returned from the shore, nor does there appear any intention, on the part of Nickerson, of appropriating them to himself. But it is satisfactorily proved that there were a number of articles abstracted from the vessel which were not returned. And, it is also in proof, that there were a number of other persons on board of her while the crew were absent. Some articles were missing, which were not taken by Nickerson, which were not returned, particularly a mattress belonging to the mate. I am unwilling to believe that he appropriated to himself any thing that he took from the vessel. But I am not so well satisfied that he took all the care that he might, and ought to have done, to prevent plunderage by others; having, as he seems to have claimed, the exclusive right of possession.

Salvors are bound, not only to scrupulous honesty themselves, but while the property is in their custody, they are justly required to employ every reasonable degree of diligence to protect it from plunderage by others. Any negligence in this respect, if not visited with an entire forfeiture of salvage, will be remembered in fixing the amount. In the present case, while I acquit Nickerson of embezzlement himself, I cannot commend his watchfulness in guarding the property against the dishonesty of others; and I regret to be obliged to take notice of it in the award I make.

With the claim of Nickerson is joined in the libel a claim of salvage by the owners of the Wyvern. I agree with the counsel for the claimants of the Perkins that, as there was nothing actually done or could be done by the Wyvern towards saving the Perkins, there can be no claim for salvage strictly, if that is considered as a compensation for active service. But I think the owners of the Wyvern are entitled to be paid for her anchor and cable. It was the cutting of her cable that prevented the collision. It is objected that the loss of the cable and anchor was a sacrifice made for the common benefit of both vessels, and that if there be any claim, it is one for contribution, and as it has been held by the

Supreme Court, 7 How. 729, *Cutler* v. *Reed*, that the admiralty has no jurisdiction over the matter of average, that this allegation must be dismissed. This case has been likened to that of the Mazourka, decided by the Circiut Court of this Circuit. But there is one circumstance that distinguishes it from that case. The Perkins was left without any men on board, and it was by the acts of the single man left on board the Wyvern, that the collision was avoided. In the relation of these two vessels to each other, the Perkins, being left without a keeper or guard, must be considered as in fault. This circumstance would throw on her the responsibility of a collision if it had happened, and ought, therefore, to subject her to the sacrifice by which it was avoided. It was argued that no fault can be imputed to her, because her crew had been separated from her by an overruling necessity, and there being no fault in the human agency provided for her safety, none can be imputed to the vessel. It is true that in strictness, fault, *culpa*, does involve the idea of a breach or neglect of duty by a voluntary agent. But in law, it may be, and is applied to inanimate objects, when there is a responsibility attached to them. It is familiarly said in cases of collision that it was occasioned by the fault of one of the vessels. The term and its legal consequences may, I think, be applied to a vessel left in a harbor or in an open roadstead, or thoroughfare, without her crew, under whatever circumstances of necessity the crew may be separated from her. If damage to another vessel is occasioned by her being thus left without a keeper, in strict propriety of language, it is rather her misfortune than her fault. But then every vessel, as well as every living agent, must bear the consequences of their own misfortunes as well as their faults, and it appears to me that the principle applies to the present case.

It may be proper before dismissing the case, to make one additional remark. The libel seems framed on the idea that salvors, by giving up the possession of the property, lose their lien upon it for salvage. This is an entirely mistaken notion. The lien of a

salvor is not, like a common-law lien, at all dependent on possession. Like other maritime liens, it is founded on a *jus in re* and may be enforced into whosever hands it comes, and if the possession is lost, the salvors may pursue their remedy against the owner by a libel *in personam*. The Eleanora Charlotte, 1 Hagg. 156.

C. G. Thomas, for libellant.

Whiting & Russel, for respondent.

THE SPEEDWELL.

SALVAGE DECREED ON THE FACTS.

The schooner Speedwell, of Plymouth, Capt. Cornish, had the misfortune to get imprisoned in this field of ice, and, after being confined there several days, was, on Sunday, the 17th of February, lying about four miles from the shore of Wellfleet, and a few rods northerly from the Acorn. During the gale and snow-storm of Sunday, about mid-day, the crew of the John Perkins left her for safety, and went on board the Acorn. There they met the crew of the Speedwell; and it was determined, after a general consultation between the crews of the three vessels, to leave for the shore. Accordingly, about five o'clock, the whole of the crews of the Speedwell and the Perkins, with all that of the Acorn, except the mate, and Maher and Troy, started for that purpose.

During the day, the Speedwell and the Acorn were both firmly fixed in the ice; but in the early part of the evening, it began to break around both vessels. Their condition now became more perilous, and about an hour after the crews left, that is, about six o'clock, the mate of the Acorn followed them. Maher and Troy now alone remained. Near the time when the mate left—perhaps a little before—the Speedwell became, by the breaking of the ice around her, so much disengaged from the firm and solid field that

she began to drift, and the wind and the current carried her directly towards the Acorn, her stern being directed towards the stern of the latter vessel. The libellants, seeing that a collision was inevitable, did what they could to diminish the danger. For that purpose, they put out a fender, so that the Speedwell, instead of striking directly on the body of the Acorn, glanced off, and was carried along parallel to her side, and thus slowly passed her side by side. Some damage, but not to a considerable amount, was done to both vessels. But for the services of the libellants, that it would have been much greater, cannot, I think, admit of doubt. And in this violent tempest, enclosed in a vast field of solid ice, and in the midst of large broken masses driven by the winds in the small open space of sea in which they lay, there was certainly no small danger that these two vessels coming in collision, with no one on board of either, might both have foundered. About an hour after the mate left, and when the Speedwell had about passed by the Acorn, with a motion carrying her further in that direction off, the wind became so threatening, that the libellants left, intending to go to the Wyvern. But in the blinding snow, and the darkness of the night, they lost their way, and returned to their own vessel. But the ice had now become so broken, that they could not get aboard, and between eight and nine o'clock, they set off for the shore. They reached land about twelve o'clock, saw the master and the rest of the crew, and early the next morning returned to their vessel, and remained in her until Wednesday, when the crews of all the vessels came off. They found the Speedwell had passed the Acorn, and lay at a small distance south of her, and both vessels now firmly frozen into the ice. Nothing more was or could be done by them for the benefit of the Speedwell. But for the services they performed Sunday evening, they claim, and, I think, are justly entitled to a compensation. What might have been the result if no one had been on board either vessel, cannot be known; but that what was done by the libellants essen-

tially contributed to the safety of the vessel, it seems to me cannot be reasonably questioned.

C. G. Thomas, for libellant.

Whiting & Russel, for respondent.

THE ACORN.

The claim set up in the libel against the Acorn has this peculiarity, which distinguishes it from the other libels heard in connection with it. It is a claim by part of the crew for a salvage compensation for meritorious services in rescuing from danger, and saving from damage or destruction, in a time of peril, their own vessel. As a general proposition, it is undoubtedly true, that the crew cannot entitle themselves to salvage against their own vessel. They are bound by their contract to use their utmost exertions for her safety, to whatever danger she may be exposed, and their wages are the stipulated compensation, with which they agree to be content for their whole services. This is the general rule, but at the same time there are admitted exceptions. One of these is, when a seaman, from whatever misfortune happening to the vessel, has been discharged from the obligation of his contract. If he afterwards renders valuable services in saving the vessel from danger, he is treated as a stranger, and has the same rights as any other volunteer. The Blaireau, 2 Cranch, 268, is a case of this kind.

Another exception, of a more equivocal character, is this; where a seaman, in a time of great peril and difficulty, in a spirit of adventurous and daring gallantry, performs services ultra above what could be fairly required from the strict and proper obligations of his contract, though that may be still subsisting and in force.

Though this exception stands quite as much on the authority of *dicta* occasionally thrown out by courts *arguendo*, as upon any ex-

press and well considered decision which I feel at liberty to quote as an authority. The whole subject I had to consider in the case of The Dawn, Davies, 121 (2 Ware R., 126), where the cases are referred to, and I have seen no cause to change the opinion there expressed.

Something of this kind is intimated by Lord Stowell in the case of The Neptune, where he describes a salvor as a volunteer, who proffers useful services to the ship without being under the obligation of any contract. 1 Hagg. 236. In the possible range of circumstances, he thought a case might occur, in which one of the crew, without his connection with the vessel, under his contract, being legally dissolved, might, by extraordinary services, entitle himself to a salvage remuneration. Abbott on Shipping, 560 and 617, notes. The only question of real difficulty, I think, is whether the facts in proof constitute this a case of that kind. For it appears to me that it cannot be fairly questioned, that a valuable service was performed by the libellants in mitigating the danger and damage, if nothing more, of the collision with the Speedwell, Sunday night, after the rest of the crew had left her.

The general circumstances under which the crews of these vessels left, for the safety of their lives, and temporarily abandoned them to the mercy of the elements, have already been mentioned. But there are some peculiarities to this vessel and crew, of which it may be proper to give a more particular detail. About five o'clock in the evening, when the collected crews had come to a general determination to leave for the shore, Capt. Gibbs spoke to one and another of his crew, and among them to the libellants, and asked them if they were going. All except the mate, and Maher and Troy, determined to go. These three determined to abide the fate of the ship, and the captain determined to remain with them. After all proper precautions were taken for the temporary safety of the ship, Capt. Gibbs committed his young son to the care of the engineer, and they started for the shore; and it was not until after the captain found that his son, from fear, refused to

be separated from his parent, that he determined to accompany him; a determination which, under the circumstances, will hardly be blamed by any one who is a parent. The mate and the libellants, were now all who remained in the vessel; and, about an hour after, the mate, alarmed by the increasing danger, followed the rest of the crew. Maher and Troy had both been familiarized with such dangers, by twelve years' experience in the seal fisheries, off the stormy and frozen coasts of Newfoundland and Labrador. And it was probably their experience and familiarity with such scenes, that induced them to remain by the vessel, when all the rest of the crew fled for the safety of their lives; perhaps because their experience had taught them that the peril was less formidable than it appeared; perhaps because fear, which naturally exaggerates danger, wears off by familiarity with it; and it may be from both causes. But the peril at last became too formidable for their hardihood, and, about an hour after the mate, they left to seek safety in the Wyvern. Failing to find that, in the darkness of the night, and, when they returned to their own vessel, finding that by the increasing violence of the storm, the ice was so broken around it that they could not get aboard, nothing remained for them but to perish with cold on the ice or make for the shore. They succeeded in reaching it about twelve o'clock, and found the master and crew safe in the house of Capt. Baker, of Wellfleet. There they remained, and the house being over-crowded with visitors, spent a sleepless night, but had the benefit of a warm fire to dry their clothes. Early in the morning, the captain and the libellants were on the look-out, and as soon as there was sufficient light, saw the vessels not far from where they had left them. There was considerable conversation in the morning, which is reported in the testimony, with respect to the measures to be adopted, which does not appear to me to be of material importance. The most material facts are, that when the master found his vessel was afloat, he spoke to the crew and said, somebody must go to her, and that if nobody else would, he should go, though he had been badly hurt

in his escape over the ice the night before, and was really unfit for the attempt. The two libellants immediately proffered their services, and, according to my recollection, they were the only members of the crew who did offer. Immediately after breakfast they set out. Indeed, I think that from the beginning, they never intended to abandon the vessel, but left from necessity, intending to return in the morning if she should then be above water; of which, when they first arrived at the house in the evening, they expressed, and of which, I believe the master and all the crew felt, no inconsiderable doubt. They accordingly did go to the vessel, and remained in her until Wednesday, when the master and crew returned.

In a calamity such as overtook these vessels, even if of such a nature that the master thinks it prudent and proper for the safety of life, temporarily to leave the ship, I hold it to be quite clear and free from doubt, that the crew are not thereby discharged from their contract and released from all their obligations to the vessel; if the abandonment is only temporary. When they have escaped to the shore, they are still under the command, and bound to obey the lawful orders of the captain in all that can be done for the interest and safety of the ship, so long as there is any reasonable hope of doing anything for her safety, or that of her cargo. It is only when the master has finally abandoned the *spes recuperandi*, that the crew are wholly released from the obligations of their contract. How far the master, on such occasions, may have the rightful power to select some from his crew and send them on a forlorn hope, where he is unwilling to lead himself, need not be considered, for no such case is here presented. When it was finally determined, Sunday evening, to leave the vessel, the master did not require any of his crew to remain. He left it to their choice, even while he contemplated himself to remain. That the vessel was placed in such circumstances of danger that the crew might temporarily leave her without a desertion of duty, seems to me cannot be doubted. Such was the joint and deliberate judgment of the mas-

ters and crews of these vessels on the spot, and has, at the hearing, been fairly and fully admitted. The voluntary act of these men, in remaining by the vessel in this danger, if they had been able to render no valuable service, might have deserved some notice from the owners, though perhaps a court might not feel itself authorized to award any compensation for it in the way of extra wages. But when it is connected with a valuable service rendered to the vessel which essentially contributed to her safety, if rendered under such circumstances, that the court may reward them for it, the fact of its being voluntary, ought not to diminish their reward. When the master returned, he expressed in warm terms his satisfaction with their conduct, and told them that he should recommend to his owners to allow them a compensation.

My opinion is, that the libellants voluntarily remaining by the vessel in such dangers, when all the rest of the crew left her, and when it is admitted they might have done so without any dereliction of duty, may justly be considered as an act beyond what was required by the fair and just obligations of their contract; and for the services which they rendered Sunday night, they are entitled to a reward in the nature of salvage. But that it should be equally large and liberal as would be allowed to entire strangers for a like service, seems not so clear. Notwithstanding the calamity and danger, they were not discharged from their contract and still owed service to the vessel, though not precisely that which was rendered; and I am inclined to think that the amount should be somewhat less than would be allowed to mere strangers.

C. G. Russel, for libellant.

J. A. Abbott, for respondent.

DECREES.

THE JOHN PERKINS.

It appears that there were some articles, of no considerable value it is true, lost from this vessel. It is certainly not proved, and I am not ready to believe that Nickerson had anything to do with the embezzlement, and therefore it is not an absolute bar to his claim of salvage. But I think that he did not take all the care that he might have done to prevent plunderage by others, and that this may justly be considered in the amount of salvage to be awarded. The owners of the Wyvern, a small vessel of 81 tons burthen, and in ballast, allowed him for his services to that vessel, $500. The John Perkins was heavily laden with corn, and together with her cargo, are valued at $7,100. I allow him $600, to be charged on the vessel and cargo *pro rata*, according to their respective values.

Value of the vessel, $4,000.

Value of the cargo, $3,100.

THE SPEEDWELL.

I see no fault to be found with Maher and Troy. Their conduct throughout appears to have been marked by prudence, courage, and good judgment. I allow them, against the Speedwell, valued with her cargo at $4,700,* the sum of $1,000, to be equally divided between them, and charged *pro rata* on the vessel and cargo.

THE ACORN.

Against the Acorn and her cargo, valued at $20,000, the vessel to which the libellants belonged, I allow $1,000, to divide equally between them.

It was strongly questioned by the claimants' counsel whether, under the circumstances in which these suits were commenced,

*The printed record shows the agreed value of the vessel and cargo to be $6,600.

costs ought to be allowed to libellants. With regard to the costs, my opinion on the whole is that they ought to be charged on the claimants. It is true that it is the habit of the admiralty to encourage parties to an amicable compromise, and if suits are commenced in hot haste, without allowing time for that purpose, when it may safely be done, to consider it in awarding costs. These suits were commenced somewhat precipitately; but from what has incidentally appeared at the hearing, I think that there was but little probability that a fair compromise would have been effected if more time had been allowed. The cases were also somewhat novel in their circumstances, and it would perhaps not be considered as any great violation of professional delicacy and honor, if the counsel had advised his client to take the opinion of a court, rather than accept any compromise likely to be offered.

THE HARRIET NEWHALL.

The nature and measure of damages considered. When intentional and when not.

September, 1856.

ASSESSOR'S REPORT.

WARE, *District Judge.*

The value put on the vessel on the evidence reported, I think is reasonable, and is confirmed at $1,500.

The damage in the loss of the cargo, is presented in the report in a double aspect. First, the original cost, including the ship's stores and furniture is found to be $557.32. Secondly, the value of the same at Boston, her port of destination, provided she arrived in safety, is found to be $1,861.72.

Which of these is the true measure of damage in a loss by collision?

Damage may be done and a right indemnity arise under two different conditions. First, under a contract, which a party has failed to perform, and the plaintiff seeks damages for the non-performance. The French Law has an appropropriate name for these, which are called *dommage et ēnterests;* and they include the actual loss sustained and the profits which the party has failed to gain. For in every contract, a profit is expected and constitutes the motive of the contract. If one party is disappointed in this expectation, by the failure of the other to fulfil his engagements, he has a right, according to the circumstances of the case, to demand a sum which will indemnify him for the actual loss and the profits, which have been defeated. See an example in Domat, Part 1, Lib. 3, Tit. 5, § 2, No. 4, which is amplified by Toullier, vol. 6, No. 286.

The second condition is when the damage is caused by a tort.

And this may be presented under a twofold aspect. The first, is when the tort is unintentional, occasioned by a fault indeed, but such a fault as may happen to a prudent and careful man from sudden surprise, by which the mind is thrown off its balance, or from momentary inattention or forgetfulness, to which the most cautious men are liable; faults

quas in curia fudit
Aut humana parum cavit natura.

Such delinquencies are looked upon with indulgence, and in these the proper measure of damages, it may be assumed with a considerable appearance of reason, is the actual loss sustained, without augmenting it by the profits which the party might have made.

The second aspect is when the tort is wilful and malicious; and here the court may and ought, according to circumstances, to enhance the indemnity by adding to the actual loss the expected profits. And the examples referred to above show that this may be done in the case of a wilful breach of contract. In some cases, as in slander, libel, seduction, torts to the person accompanied with contumely and intended to disgrace a man, it has been thought that courts may go beyond a simple reparation of the wrong to the individual, and award damages *in poenam*, Greenleaf Evidence, vol. 2, § 253, and note where the question is fully argued *pro et contra*.

Collision almost invariably belongs to the first class. We never suppose it to be intentional and malicious, and it would seem that the proper measure of damage is the actual loss sustained. Parsons on Contracts, vol. 2, 459, and the cases in the notes. In the case of the Anna Maria, 2 Wheat, 327, which was a wrongful capture by a privateer, the conduct of the captors is described as 'a wanton marine trespass for which no sufficient excuse was given. The breaking open of trunks, when keys were offered them, and taking out the crew and putting them in irons and leaving the vessel in this situation, were acts not to be excused.' And the ultimate loss of the vessel is represented as resulting from the illegal violence and misconduct of the captors. As the loss, in this case,

was the consequence of a wanton and malicious tort, it would hardly have been considered as a harsh judgment, if the court had added to the actual loss, the reasonable profit that might have been expected from the sale of the cargo at the port of destination. *Nique malities indulgendum est*, Dig. 6, 1–38. A wilful trespasser has no reason for complaint, if he is required to put the injured party in as good a condition in every respect as he would have been in, but for the wrong done; yet the court, in this case, held that the true measure of damages was 'the value of the vessel and the prime cost of the cargo, with all charges and the premium of insurances where it has been paid with interest.' Nothing was allowed for expected profits. A claim of expected profits was presented in a subsequent case, The Amiable Nancy, 3 Wheat. 546, and was rejected, first on account of the uncertainty of the rule in its application, and secondly, the difficulty of supporting its legal correctness. Though the courts say, that if the suit had been against the original wrong doers, it might have been proper to visit upon them exemplary damages, as a proper punishment for their lawless violence. These decisions establish a rule of damages in cases of marine tort, not only on the highest authority and that binding on this court, but one that appears to be reasonable when the tort is not malicious. When it is, the latter case comes very near to an authority for going beyond that, nor do I see any impropriety nor any violation of sound judicial principle, in adding the profits of the sale at the port of destination. The difficulty of determining precisely what they might have been, does not appear to me to be an insuperable objection to the allowance of a fair mercantile profit.

The Francis was lost by the collision on her return from Newfoundland, where she had been for a cargo of fish. I do not understand that she earned freight on her outward voyage. The fish were taken in fresh and salted by the crew with salt taken out for that purpose. The prime cost of the fish must be considered as what was paid for them in Newfoundland, and of the salt, the

price paid in Boston. To this must be added a reasonable charter of the vessel from the time she left Boston to that of the disaster, with wages and subsistence of the master and crew, with the premium of insurance, if any was paid, and if not a fair premium for the voyage.

Shepley & Dana, for libellants.

Howard & Strout, for respondent.

NOTE.

How far courts and juries are, in cases of malicious torts, authorized to award penal damages, is a question perhaps not perfectly settled in the jurisprudence of the common law. The question has been learnedly and acutely examined by Mr. Sedgwick of the New York bar, in a treatise on the Law of Damages, and by Mr. Greenleaf, in the second volume of his excellent Treatise on Evidence, No. 253, note. Mr. Sedgwick holds, on the authority of decided cases, that the jury may legally give punitory damages by way of example. Mr. Greeenleaf, that only compensatory damages can be given. It is certain that the language often used by the courts, not only in charges to the jury, but in opinions deliberately given on questions of law, goes very far to justify the doctrine maintained by Mr. Sedgwick. Exemplary, vindictive and punitory damages, and most money damages *in poenam*, in their fair and common meaning, imply something more than a bare and naked compensation to the complainant. Mr. Greenleaf, by a careful analysis of the cases, has endeavored to show that this language may be satisfied if it is restricted to mere compensatory damages, a simple *restitutio in integrum* of the injured person, and in some of them he has perhaps successfully shown it; but in others this seems to be doing some

violence to the ordinary and natural meaning of the words. Whether all the cases will admit of this construction or not, where the question is reduced to its elements and examined on principle, it seems to be quite clear in theory that Mr. Greenleaf maintains the true principle.

Every private wrong that involves a violation of public order, includes two kinds of injury perfectly distinct in their nature; the private damages sustained by the injured individual and the public injury by the example of violation of public order, and the license and encouragement which would be given to the lawless and violent if it were not repressed by due punishment. The individual is to be indemnified by a private action in his own name, the public by their own action and by a penalty proper in its nature and extent to protect the public from the influence of such examples. But there is no reason why the indemnity due to the public for the wrong done to them, should be transferred as a gratuity to the individual through whom they have suffered.

SALMON FALLS MANUFACTURING COMPANY, *vs.* THE BARK TANGIER.
DAVID GODDARD, *vs.* THE SAME.
JOHN H. PEARSON, *vs.* THE SAME.

When a vessel arrives from a foreign port, and the master has safely moored his vessel at a suitable wharf, it is his duty to give early notice to the consignees of the cargo of his arrival, where his vessel lies, and that he is ready to deliver their goods. And the same rule applies to long coasting voyages.

The notice ought regularly to be given before the unlading is begun.

After such notice, and a permit is obtained, he may ordinarily, at a proper time and in the working hours of the day, proceed to discharge the cargo.

It is the duty of the consignees, on receiving such notice, promptly to be on the wharf to receive their goods as they are discharged from the vessel.

When the master, with such notice, has transferred the goods from the vessel and safely deposited them on the wharf, where and at a time when they can with reasonable convenience be received by the consignees, he has completed his contract as a carrier.

But this does not amount to a delivery until the consignee receives them.

A delivery, in the sense in which the word is used in a bill of lading, includes a transfer of the possession, actual or constructive, and with it the right and liabilities incident to the possession.

If the consignee is not present to receive the goods, or for any cause declines to do it, the placing the goods on the wharf is a tender of delivery that discharges the master as a carrier, but the goods remain in his custody with the responsibilities of an ordinary bailee for hire.

If after the unlading is begun and before it is completed, a Fast-day intervenes, the master, by the custom of the port of Boston, is authorized to continue the work as on an ordinary working day, at least in the forenoon.

Or if the work has been suspended by the wharf being crowded, and it is then cleared, he may recommence the unlading without any new notice; and when the goods are placed on the wharf, he will be discharged as a carrier.

When several persons have causes of action of a like nature, and involving one or more questions common to all against a vessel, all may join in one libel.

In such case of joinder, the evidence touching the questions common to all is taken but once, and when these questions are decided, the cases become separate and independent, and each is litigated on its own merits.

DISTRICT COURT—MASSACHUSETTS DISTRICT, OCT., 1856.

WARE, *District Judge.*

Before proceeding to examine these cases on their merits, it may not be improper to observe that some time and some expense would have been saved, if these three libels had been nnited in one; or if, before hearing the first, the three had been consolidated and heard together. They all involve one or more questions as to the liability of the vessel for the loss of the cotton under circumstances common to all. Such a joinder of parties, where several persons have causes of action of a like nature, and involving one or more questions common to all, is authorized by the general principles of admiralty practice. It has from time immemorial been the familiar usage in the case of seamen suing for their wages. But it is a right which extends to all parties in analogous cases. The Supreme Court has held that it extends to several consignees suing for damages sustained by their goods from the unseaworthiness of the vessel or the fault of the master. *Rich* v. *Lambert*, 12 How. 353. And I have supposed that it embraced suits by material men, where the liability of the vessel is a question involved. Such joinder is not only authorized by the general principles of admiralty practice, but is specially enjoined by the process act of July 22, 1813. (III. Stat. at Large, sect. 3, p. 19.) The act, so far as it applies to proceedings in the admiralty, I understand to be merely in affirmance of the pre-existing law of the Court. In such cases of joinder or consolidation, all the evidence touching the questions common to all the cases, is taken but once, and when these questions are decided, the cases become separate and distinct, and each party litigates his own on its own peculiar merits.

In this case one of the libels was heard and argued separately, and two were heard together; but in reviewing the evidence offered in all, I have come to the conclusion that they may all well be considered together, so far as the questions common to all are concerned, and I shall proceed to state my opinion on these questions precisely as though there had been a joinder or consolidation, noticing incidentally any matters that may be peculiar to either.

The bark Tangier arrived in Boston on Saturday, April the 6th, 1856, from Apalachicola, with a cargo of 998 bales of cotton, and on Monday A. M. was safely moored at Lewis' Wharf. Of this cotton, 558 bales were consigned to Goddard & Pritchard, 100 to Pearson, and 100 to the Salmon Falls Manufacturing Company, and the residue to other consignees. The master on Monday gave notice to the consignees of his arrival, of the place where his vessel lay, and that he was ready to deliver their goods. The unlivery was commenced in the afternoon, and was continued through the next forenoon, when, the cotton not being removed, the wharf became so full that the work was suspended. A new notice was given to Goddard & Pritchard, and to Pearson, on Tuesday, and they still neglecting to remove their cotton, were hastened by a third notice on Wednesday morning. But it is, on the evidence, not so certain that a second notice was given to Aiken, the Agent of the Salmon Falls Co. Wednesday afternoon, all the cotton which had been unladen Monday and Tuesday was removed, with the exception of 325 bales, which remained on the wharf over night. The wharf was now so far cleared that the unlivery was resumed and completed by about 1 o'clock Thursday. None was removed that day, except four or five bales by Goddard and Pritchard, and between two and three o'clock the cotton remaining on the wharf was consumed or damaged by an accidental fire. Of G. & P.'s cotton, 163 bales had been received and taken away, leaving 425 bales. Of the Salmon Falls Company's cotton, 30 bales had been removed by their agent, and 65 were burnt or damaged, and of Pearson's, 25 had been taken and 75 were left for the fire.

On this state of facts, libels are brought against the vessel, and she is arrested as responsible for the default of the master in not delivering the goods according to the terms of the bills of lading. The whole case, both on the evidence and the law arising on the facts, has been most thoroughly and ably argued on both sides; and it only remains for me to express the best opinion I have been able to

form of the result. With respect to the principal matters of fact on which the decision must turn, there is, I think, but little difficulty; but they involve some questions of law, which appear to me of no inconsiderable delicacy, and to be not wholly free from doubt.

The first question, which has been urged, is whether the master is exempted from the loss by fire, by virtue of the Act of Congress of March 3, 1851.

Vol. 9, Stat. at Large, page 631, c. 43.

The second is, admitting that he is not exempted by the statute whether upon the facts proved in this case he is liable for the loss on the general principles of the maritime law.

And thirdly, under this, a considerable portion of the goods having been landed on the tenth day of April, which was appointed by the Governor a general Fast day, whether this was a day, in which, by the custom of the port, the master was authorized to discharge his cargo.

I shall first consider the second question that has been argued. These libels are all founded on bills of lading, in the common form; shipped in good order and condition on board the barque Tangier, at Apalachicola, and to be delivered in like good order and condition at the port of Boston to the consignees—dangers of the sea only excepted. Loss by fire is not in the sense of the law one of the dangers of the seas excepted in the bill of lading, and the master stands as an insurer against all others. Nothing short of a delivery can relieve him from the obligation of his contract, or some excuse for the non-delivery, which the law will hold to be sufficient, notwithstanding his contract.

Has there been then, a delivery? The contract is not merely to deliver at the port of Boston, but to deliver to the consignees named in the bills of lading. In its terms it requires a delivery to the person. A delivery to a drayman, employed by him, would, in legal intendment, be a delivery to him. But the words of a bill of lading in their natural and ordinary meaning, appear to import a personal delivery; such a delivery as is required in the case of a

sale, in those systems of law and in those cases where a delivery is required to consummate the contract and operate a transfer of the property. And in those cases it must include a transfer of the legal possession, so as to exonerate the vender or the person making the delivery from all the responsibilities attached to the possession, and to place the risk on the other party. For this purpose it is true that an actual manucaption of the goods is not necessary. There may be a constructive or a symbolical delivery in its legal effects equivalent to an actual delivery, as the delivery of a raft of lumber lying in a lake or river by the vender pointing it out to the sight of the vendee, or the delivery of goods in a warehouse by the delivery of the key, with a sufficient description of the goods. In these cases, though there is no passing the goods from hand to hand, *traditio*, there is a legal transfer of the possession and the risk of the goods is shifted to the purchaser, or to the person to whom the delivery is made under any other contract, as much as though they had actually been put into his hands. A delivery in the strict and proper sense of the word seems to me always to imply this transfer of the possession, actual or legal, and with it the rights and responsibilities attached to the possession. One consequence involved in this doctrine is that to complete the legal delivery there must be an acceptance actual or implied.

This, as I think, is the sense in which the word is used in bills of lading, and in the delivery of the goods. The argument of the claimant's counsel tacitly admits that there has been no such delivery as transferred the legal possession with the rights and obligations incident to it. His argument is that the discharge of the goods on the wharf with notice was a tender of the goods that completed the whole duty of the master as carrier.

It was the termination, a complete performance of that contract with all its peculiar responsibilities. But it is conceded that another obligation immediately followed, that of custody, to protect the property from plunderage and other loss; and that this obligation was not merely that of a depository bound to slight diligence only,

but that of a bailee for hire, having his compensation for this service in his freights. The master also considered his obligation in the same light, for he kept guard over the cotton during the whole time it was on the wharf, by his own men in the day time on board his ship, and by a hired watch in the night.

If there was no delivery in the strict and technical sense of the word, has the master any excuse for the non-delivery? I agree with the counsel for the libellant that the master's contract, though it consists of two parts, is a legal entirety; it is to carry and deliver. The carriage, the transportation of the goods from port to port, is his own independent act, which he can perform alone, without the aid of any other party. That is accomplished when he has transported them from the port of lading to the port of delivery, and safely deposited the goods on the wharf. Thus far he is a carrier, and here this part of his contract, that is for carriage, is complete. In transportation by water in sea-going vessels the carrier is not bound to carry the goods to the warehouse of the owner or consignee, however it may be in some cases of land transportation. The place of delivery is the wharf. The second obligation, that to deliver, remained to be performed. Now this is an act which the master cannot perform alone. It requires the concurrence of the consignee. All that the master can do alone is to deposit the goods at the place, where the delivery is to be made, and offer them to the owner named in the bill of lading. If he is not there to receive them, then the master is bound, in cases like this, of maritime transportation, by custom, for the care and custody of the goods until the owner comes to receive them. If he does not come at all, then he is bound to have the goods housed in a safe and proper warehouse at the owner's expense. If the owner or consignee does come, and for any cause, declines to receive the goods, it is certain that there is no delivery; it is, I think, equally certain, that there is an offer or tender of delivery. But the master is not thereby discharged from all care of the goods. He is bound to the duty of custody, precisely as though no owner had called for them, and to have them properly warehoused.

This I take to be the universal custom, and sanctioned by law. Then comes up the important question, was he bound for the safe keeping of the goods as a carrier, or only as a bailee for hire. The distinction between the liabilities of the two makes all the difference in these cases. As a carrier he will be liable for their loss, but as a bailee for hire, the loss being purely fortuitous, and he not in fault, he will be exempt from liability. My opinion, both on principle, the reason of the thing, and the authority of judicial decisions, is that he was discharged from his engagement as a carrier, and remained liable only as an ordinary custodian having a compensation for his services.

The duties of the parties with respect to the delivery of goods from seagoing vessels, I suppose to be quite clear and well-defined. It is that the master, as soon as his vessel is safely moored at the wharf, give notice to the owners and consignees of his arrival, of the place where his ship lies and that he is ready to deliver their goods. As the delivery is to be on the wharf, it is the duty of the consignees to be present and receive them as they are discharged from the vessel. *Goold* v. *Chapin*, 10 *Barb.* 612. In the business of maritime trade, promptitude and despatch are expected of all parties. Ships, whose employment is on the sea, are obliged to wait the opportunities of wind and weather, and do not willingly brook delay where these are favorable. The master has also a just motive for hastening the discharge of his vessel, in order to relieve the owners from the expense of demurrage, and to get his ship ready for another voyage. He has another motive not less legitimate, to liberate himself and his ship from the onerous liabilities of a carrier. And this, I think he does as soon as with notice he places the goods safely on the wharf. He is not bound to wait the convenience of dilatory consignees. If they are not present, and inconvenience or loss results from their neglect, it is not the master's fault, and every one must bear the burthen of his own faults.

The placing the goods on the wharf at a suitable time when they may be received by the consignee, appears to me to be a tender of

delivery, that discharges the master as a carrier, whether the consignee is there to receive them or not. There certainly must be sometime when the master may relieve himself from the responsibilities of a carrier without the concurrence of the other party.

He may do so by a tender, and if that tender is not a perfected act when the goods are first put on the wharf, how long must they remain there for that purpose? Shall the time be fixed for an hour, or a day, or longer; for such goods as cotton are not unfrequently left on the wharf for several days before they are taken away. If we do not take the time when they are first put on the wharf, I am entirely at a loss in determining when the time shall be fixed.

My opinion is, that placing the goods on the wharf at a suitable time, with proper notice where they may be received, is a tender of delivery that discharges the master as a carrier, as much as an actual delivery. It is a general principle of law resting on broad foundations of natural justice and applicable to a great variety of cases, that where a person is bound to perform a certain act for the purpose of discharging himself from an obligation or acquiring a right, an offer or a tender of performance, properly made, is equivlent to an actual performance for the purpose of relieving himself from the obligation or of acquiring the right. In the Roman law it is put into the form of a maxim, and is inserted among the *regulæ juris*. In all cases an act is considered as done, when the delay of the other party has prevented its being done. *In omnibus causis pro facto accipitur in quo per alium mora sit, quominus fiat.—Dig.* 50, 17, 39. A person who is ready and willing to perform his contract or obligation shall not be deprived of the benefit of performance by the malice, caprice, or neglect of another party.*

The usual and proper notice was given of the vessel's arrival, and I think that one notice was sufficient. It was the right of the master, after the unlivery was begun, to continue the work until it

*If any authority is required for so plain a principle of natural justice, some may be found referred to in the *Palo Alto*, *Daveis*, 348-9 (2 Ware R. 344), where it was applied in a case of considerable delicacy.

was completed, as fast as the goods could conveniently be removed. If it became necessary by the encumbering of the wharf to suspend the work for a time, the fault was not his; for it appears from the testimony that the cotton might have been removed as fast as it could be discharged. In the case of the Salmon Falls Company, an objection is made to the sufficiency of the notice. It is said that it was not until after the unlivery was begun. Without doubt, regularly it should be before. There is some doubt, I think, as to the fact, but admitting it to be as contended, if the fire had happened before the notice, it would deserve very grave consideration. But the fire occurred three days after, and the party suffered nothing from this irregularity. The objection is purely technical in its application to this case. And though in a case of purely fortuitous loss like this, a party is not to be censured for resorting to the subtleties of the law to escape, the objection appears to me to be too high among the *apices* of the law to be applied to the transactions of merchants and shipmasters. My opinion on principle is that the landing on the wharf, with the notice given, was equivalent to an actual delivery, for the purposes of these actions, supposing the time to be unobjectionable, which will be considered presently.

My opinion also is that the decisions of the Courts and the language of elementary writers lead to the same conclusion. The authorities cited by the counsel for the claimant appear to me fairly to support this doctrine. Story Bailments § 545; 2 Kent Com. 604 and the notes to the 6th edition; *Norway Plains Co.* v. *the Boston and Maine R. R.*, 1 Gray 271; *Cope* v. *Cordova*, 1 Rawle 203; *Hyde* v. *the Trent and Mercy Nav. Co.*, 5 T. R. 329; *Gould* v. *Chapin*, 10 Barb. 612.

The Boston and Maine Railroad Company in 1 Gray, is certainly a very strong case and was evidently decided on very deliberate consideration. That, it is true, was a case of land transportation, but the principle of the decision applies to the present case. The principle, as I understand it, is this: when the carrier has transported the goods to the place, where, by custom or agreement, they

are to be delivered, and has safely deposited them so that they may be received by the owner, he has completed his engagement as a carrier, and his responsibilities, in that character, are at an end. It was therefore held, that as soon as the goods were transferred from the cars to the platform, the Road ceased to be a carrier, and from that moment was liable only as a warehouseman, and the goods during the night having been destroyed by an accidental fire, the loss fell on the owner.

The authorities relied upon by the other side, do not appear to me, when fairly examined, to militate against this doctrine. *Price* v. *Powell*, 3 Com. 333; *Miller* v. *The Steam Nav. Co.*, 13 Barb. 361; *Gatliff* v. *Bourne*, 4 Bing., N. C., 311; and S. C. 3 Man. & Grang. 643; and in *Clark* v. *Finelly*, 45.

The case of *Gatliff* v. *Bourne*, which was litigated through all the courts and finally decided by the House of Lords, was, in its leading facts, very much like the present. The goods were landed on the wharf in London, on the 29th of August, and burnt the following night by an accidental fire, and the carrier was held liable for the loss. The case was argued and decided on the allegations in the pleadings, and in those it differed from the present case in two material particulars. First, it did not appear that the consignees were notified of the arrival of the vessel; and secondly, it did not appear that the goods were landed at a suitable time for the consignees to receive and take them away. One of the judges observed that for anything that appeared in the record, the goods might have been landed in the night time (though from evidence at the trial, it appeared that the unlading was between 11 o'clock A. M. and 2 P. M.). Mr. Angel, after a copious examination of authorities, states in substance, as the true result of the whole, that when goods are to be delivered at a particular place, due and reasonable notice giving the consignees a fair opportunity to receive and take them away, comes in lieu of an actual delivery for the purpose of discharging the party from the obligation of a carrier; Angel on Carriers, § 313; that is, though, not a delivery, in fact; it is a tender of delivery that completes his contract as carrier.

Having this view of the law, it is, to my mind, quite clear that the master cannot be held liable for the loss of so much of the cotton as was discharged as early as Tuesday noon. Whether he may be for that, which was discharged Thursday depends entirely on the question, whether Thursday was a suitable and proper time for the delivery of the cotton under the circumstances of these cases. If it was, the consignees were bound to be on the wharf and receive it. If it was not, they were not so bound, and the master is no more relieved from his obligations as a carrier, than he would be by discharging it at an unseasonable hour in the day or in the night time.

This brings up the question which I have found the most embarrassing in the whole case, not only as involving legal considerations of delicacy as to the effect of the custom of the port, to which the attention of the courts of the State does not seem to have been called, but because it is pretty apparent from the testimony that the question cannot be decided one way or the other without encountering and doing some violence to the cherished habits and feelings of considerable and highly respectable portions of the community.

On the part of the libellant it is contended that Fast day has, from the first settlement of the Commonwealth, been observed as a day of rest, when the usual secular employments of life are suspended, and is therefore not a suitable and proper time for discharging vessels; that the consignees are not bound to be present with their teams to receive their goods, and consequently, when the master discharged the cargo that day, he did it in his own wrong. To maintain this, the Governor's proclamation is put into the case, setting apart that day as a day of fasting, humiliation and prayer, and recommending to the people to assemble in their usual places of public worship and devote the time to religious duties, which manifestly implies a suspension of the ordinary secular labors of life. This custom is attested by a regular series of public acts of the Executive, commencing with the earliest history of the Commonwealth, and continued to the present time. It is contended that it is a well known historical fact, of which the Court will take

notice without formal proof, that the day, from the first settlement of the country, and for a long period after, has been observed according to the Governor's recommendation as a day of rest. If this be a fact of which the Court can judicially take notice, and I am inclined to think it is, then this consequence follows; a particular custom, that is, a particular state of things having been shown to exist at a former time, that is presumed to continue until the contrary is proved. It will follow that Fast day, *prima facie*, cannot be considered as a proper and suitable time to require consignees to receive their goods.

But if Fast is such a holiday, it is so merely by the force of custom, and not like Sunday, by positive law. And for the purposes of the present hearing it is such no farther than the present custom makes it so. What custom has made custom may change, and the rights of the parties, as they are affected by the custom, are to be determined by the custom as it now is, and not as it was at any former time. So that the only effect of this presumption is to shift the burthen of proof and require the claimant to show that, whatever may have been the historic custom, it has become so changed in the progress of time, that Fast day, according to the present usage, is a suitable and proper time for the transaction of the particular business, the consideration of which is involved in these cases. For we are not required to travel out of the case to determine the general character of the day.

For this purpose a large number of stevedores were called and examined; a class of persons by whom the discharging of vessels is exclusively performed. Without going into detail, the general result of their testimony may be stated in a few words. They are generally, not perhaps universally, disinclined to commence the discharge of a vessel on Fast day; but if they have one on hand begun and a Fast day intervenes, they do not suspend the work, but it is invariably continued, and it is continued as a matter of course, whether the draymen are on the wharf to receive the goods or not; and this is done under the general notice. No special notice on

account of the Fast is given, that the unlivery will be continued. If the cargo consists of goods not liable to be injured by exposure (and cotton is one of those articles), they are put on the wharf and left with no other protection than a common watch.

If it consists of goods liable to injury from exposure or wet, and they are not taken away, the work notwithstanding goes on, and the goods are put under cover or housed. Still, it is apparent that the day is not regarded, *even* by the stevedores, precisely as a common working day. They are generally, if not universally inclined to take part of the day for rest or recreation, and ordinarily break off with the dinner hour unless in cases of urgency. Such is the testimony of a large number of stevedores, who have for many years been engaged *largely* in this business.

The next most material testimony in relation to the custom comes from the draymen, who receive the goods on the wharf and carry them away. The stevedores are employed by the master, the draymen by the owners and consignees of the goods. Their testimony allowing for some slight difference arising from individual tastes and habits, is pretty uniform. They are disinclined generally to turn out their teams on that day, and ordinarily do not. To the teams it is for the most part a day of rest. But the exceptions are *far* from being *infrequent*. And on the day of this fire the draymen employed by one of these consignees had five teams out carting iron through the streets to the distance of three-quarters of a mile. In cases of urgency, and these are pretty frequent where vessels are partly discharged, they generally consent to go out with their teams.

A third source from which the most direct evidence respecting the custom is derived, is the testimony of merchants. A considerable number were examined, who have been for many years largely engaged in commerce, both as importers and ship owners. Their testimony is invariable and without exception that they know of no custom of receiving goods from vessels Fast day, but that the custom as far as their knowledge extends, is the other way. Their

stores are not opened for business, and some of them add that in an experience of active business for twenty or thirty years they have never had a consignment of goods delivered that day.

Such is the general complexion of the proof coming from persons whose employment and profession has necessarily led them to be familiar with the custom of the port in this particular. But there is other testimony of a general character, which has a bearing more or less direct on the case. It comes from persons whose business and habits carry them to the wharves, and who have ample opportunities of observing what is going forward. From the whole testimony it is apparent that there is much less stir and activity on that than on any common working day. Many, if not a majority of the stores are closed, but many also are partially open. There is not more than one-half the usual amount of any kind of business done, and not more than one-quarter of the trucking, and this is mostly confined to the forenoon.

The railroad depots are not open for receiving freight, and no freight train is run. But the general express office is open, both for receiving and delivering goods. And the day is so far properly a holiday, *dies feriatus*, that the custom-houses and banks are closed, and the churches are in part open, though thinly attended.

Such is the general outline of the evidence as I have gathered it from a minute and critical examination of the witnesses. And the question is whether the discharging of goods Fast day under the custom of this port, and the circumstances proved amounted to a legal tender of delivery, that completed the contract of the master as a carrier, admitting that such would be the effect of a discharge on a common working day.

On the whole evidence it appears to be quite clear that the customary observance of the day has been, perhaps is now, undergoing a change. It has lost much but not the whole of its ancient sanctity as a day of religious quiet and abstraction from secular cares and employments, without having yet acquired any other distinct and well marked character. Practically, it is in part a work-

ing day; at least, in relation to this particular branch of business; partly it continues a day of religious rest, and perhaps more largely than either, it is a day of general relaxation and amusement. While the day is in this undefined state, a state of transition, and parties in their business transactions claim the rights and immunities belonging to either phase of the day, it is not easy to determine what rule ought to be applied. As the day was formerly regarded and observed, there need be little hesitation in saying that it was not a suitable and proper time for requiring merchants to receive their goods on the wharves; and in the manner in which our great national festival is now observed, I think there would be as little difficulty. But in the equivocal position, which the day now holds between a working day, a day of general relaxation and amusement, and a day of religious rest, it may be questionable whether it is entitled to the full privileges of either. After some reflection, it appears to me that there is one way of extrication from the embarrassment so far as it is involved in these cases.

The consideration of the character of the day, for the present purpose, is narrowed down to the particular business of discharging vessels. Now it is proved by a weight of evidence entirely irresistible, that, by the custom of this port, if the unlivery has been begun, and a Fast intervenes before it is finished, the work is continued that day. Especially when the discharge has been interrupted by the neglect of the consignee to take away the goods, the practice is universal; and this custom either was or might have been known by the consignees. When the obstruction on the wharf was removed, the master was justified in recommencing the discharge without any new notice to the consignees. This custom is so universal in this port, that I think merchants must be held bound to know it. If for any reason a consignee is unable or unwilling to receive his goods, he is, in my opinion, bound to give the master notice; and if he does not, the master may well conclude that he has no objection; and a discharge on that day will relieve him as a carrier, as it would on any working day.

What would have been the effect if such notice had been given, need not be considered in these cases. What the decision should have been if the unlivery had not been begun before the Fast, is another question equally out of these cases, and I have no desire to make this decision broader than is required to cover the facts. At the first view, it may seem that a distinction might be made between the case of the Salmon Falls factory and the others. Their cotton was to be delivered at the railroad depot, which was closed, and the agents of the company could not receive and store it. But as he must be held cognizant of the custom, he might have given the master notice and had whatever benefit would be derived from that; and I think there is no sound principle upon which this case can be distinguished from the others. The conclusion is, that the libels must all be dismissed with cost. Having come to this conclusion on the general principles of the law, it becomes unnecessary to express any opinion as to the effect of the statutes.

Goodrich for Salmon Falls Manufac. Co.
Goodrich for Goddard & Pritchard.
C. P. Curtis & C. P. Curtis, jr., for Pearson.
Choate & Bell, for respondent.

NOTE.—The decision of the District Court was reversed by the Circuit Court, but on appeal to the Supreme Court the decision of the Circuit Court was reversed and that of the District Court affirmed. 23 How. 28.

THE IANTHE.

Fishermen who ship for a fishing voyage under a written contract, have a lien on the vessel for six months after the service is ended, and the fish sold for the value of their shares, which may be enforced by process in admiralty.

But the Statute makes no provision for fishermen who ship without a written agreement, but leaves them to the rights which their contract by law gives them.

The act of 1790, which allows to seamen shipped without a written contract the highest rate of wages, does not apply to fishing voyages.

The facts in this case are stated in the opinion of the court.

November 10, 1856.

WARE, *District Judge.*

This is a libel *in rem* for wages. The libellants shipped on board the Ianthe, a vessel engaged in the mackerel fishery, on the 22d of July, 1856, for a fishing voyage, and served until September 25, when they were discharged. No agreement in writing was made with either of them, and they now claim, under the Statute of July 20, 1790, c. 29, § 1, the highest rate of wages.

That act requires every master or commander of a vessel of the burthen of 50 tons, or more, bound to any foreign port, or to a port in any other than an adjoining State, to make an agreement in writing or print with every mariner, not an apprentice of himself or the owners, declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped, and in default of this, 'he shall pay every such seaman or mariner the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage, within three months before the time of such shipping.'

The Act of February 22, 1803, chapter 9, § 1 (Statutes at Large, page 203), requires the master of every vessel bound on a foreign voyage, before the clearance of his vessel, to deliver to the

collector of the port 'a list containing the names of his crew, places of birth and residence, as far as he can ascertain, and a description of the persons who compose the ship's company,' a certified copy of which, shall be delivered to him by the collector.

The Act of July 20, 1840, c. 48, §§ 1, 10 (Statutes at Large, vol. 5, p. 395), provides that all shipments of seamen made contrary to the provisions of this or any other act of Congress, shall be void; and any seaman so shipped may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at the time of his shipment.'

These acts being in *pari materia*, and not conflicting with one another, may all be considered as equally in force, and a seaman shipped without a contract in writing or print, may quit the ship when he pleases—is not bound by the regulation, nor subject to the penalties and forfeitures of the act of 1790 (see § 1), and may demand the highest rate of wages paid within three months of his shipment, at the port where he shipped, or the highest wages paid to any of the crew. But these acts apply only to vessels bound either to a foreign port, or to a port in a State, other than an adjoining State. This vessel was bound to neither, but on a general fishing cruise. She is certainly not within the words of any of these statutes, nor do I see that she is within their general reasons or policy.

The fishing trade of the country is, and always has been, regulated by its own appropriate and peculiar system of laws. The first act of Congress on the subject, is that of February 16, 1792, c. 6 (Statutes at Large, vol. 1, p. 229). This was a temporary act, and expired by its own limitation at the end of seven years, and the end of the next session of Congress. But it was continued in force by the act of April 12, 1800 (Statutes at Large, vol. 2, p. 36), for ten years longer. Then followed the act of June 19, 1813, c. 9 (Statutes at Large, vol. 3, p. 2). This appears to be, in substance, a reënactment of the 4th and 5th sections of the act of 1792, omitting that part of the act which related to the bounties.

The first section of this act requires the master or skipper of any vessel of twenty tons burthen or more, qualified for carrying on the bank or other cod fisheries, and bound from any port of the United States, to be employed in such fishery, before proceeding on the voyage, to make an agreement in writing or print, with every fisherman employed (except only an apprentice to him or the owners); that this agreement, in addition to such terms as may be agreed upon by the parties, shall express whether the same is to continue for one voyage or the fishing season, and also that the fish or proceeds of the voyage, which may appertain to the fishermen, shall be divided among them in proportion to the quantity taken by each, and that this agreement shall be countersigned by the owner of the vessel.

It provides also, that if any seaman who shall have signed the agreement shall desert, he shall be subject to the same penalties as seamen are, deserting from the merchant service, and like them be liable to be apprehended on complaint and detained.

The second section provides, when such an agreement is made and signed, and the fish taken have been cured and sold by the owner, that the vessel shall for six months after such sale, be liable for the skipper's and each seaman's share, and may be proceeded against as any other vessel may be for seamen's wages, and on such process the owners shall produce a just and true account of the sales and division of the fish, according to the agreement, otherwise the ship shall be answerable for the highest value of the shares demanded.

The act of May 25, 1828, merely provides for licensing vessels for carrying on the mackerel fishery, according to the licensing act of 1793, and applies to them all the provisions of that act.

These are all the provisions of law that I find, which are applicable to this libel. If we suppose that the regulations for vessels engaged in the cod fishery may be extended to the mackerel fishery, as far as they are in their nature applicable, they will not reach the present libel. This act does not contemplate or provide

for the case of a fisherman shipped without a written agreement, and by not providing for it, leaves the rights of the parties to be determined by the principles of law governing other parol contracts, that is, it leaves them just such rights as are secured by their agreements, and gives them no others. The act of 1790, allowing to seamen, shipped without a contract in writing, the highest wages, notwithstanding any parol contract, is confined to cases of vessels bound on a foreign voyage, or to a domestic port other than that of an adjoining State. It does not extend to the trade between ports of the same State, nor with them of an adjoining State, nor can it be made to reach an ordinary fishing voyage, without doing violence to the language or interpolating words which the legislature have not seen fit to use.

My opinion is that the claim set up by this libel, cannot be maintained, and that the libellants can recover nothing more than is provided by their agreement.

T. J. Sewall and *Geo. F. Shepley*, for libellants.

A. Merrill, for respondent.

THE LOUISA.

When a steamer and sailing vessel are approaching each other in such a direction that there is danger of a collision, the sailing vessel has the right of way, and should hold on her course, whether she has the wind free or is close hauled.

It is the duty of the steamer to take the necessary precaution to keep out of her way. If she does not, and a collision happens she will *prima facie* be deemed in fault.

When two vessels are approaching each other so that there is danger of their meeting, the general rule is that each vessel is to keep to the right.

This in all ordinary cases is the rule whether both are sailing vessels or both steamers, or one is a steamer and the other moved by the wind.

The material facts in this case are stated in the opinion of the court.

March, 1857.

WARE, *District Judge.*

The Forest City steamer, in the regular trade between Portland and Boston, in the evening of the 16th of February left the wharf at Portland on a trip to Boston, and about half-past twelve the next morning, when about 10 miles south of the Isle of Shoals, she came in collision with the brig Louisa, on her passage from Boston to Portland. She sustained some injury by the collision, and this trial is brought to charge the brig in the damage. The steamer was on a course S.S.W., with the wind dead ahead, and the Louisa on a course N.N.E., directly before the wind. Both were in the track usually taken by vessels between these ports when the wind is favorable. There is some difference in the testimony as to the state of the weather at the time of the collision. The first part of the night, it is agreed, was foggy and dark. But according to the testimony from the steamer, some time before 12 o'clock the fog cleared away so that the stars were seen, and continued so until after the collision. The pilot says that with his night glass he saw the brig two miles ahead, and kept her in view till the time of the

collision; that shortly before he passed a steamer from Boston for Portland, and saw her lights at the distance of four or five miles; and that at the time of the collision a steamer's lights might be seen six or seven miles. On the other hand, the mate of the brig, who was at the helm, says that at the time the fog was dense and the stars hid, and that he did not see the steamer's lights until she was within three-quarters of a mile. On the whole evidence, my opinion is that if there had been a proper look-out on board the brig, such as there ought to be in so great a thoroughfare for vessels, the steamer's lights would have been sooner seen.

There are some principles of law applicable to cases like the present, so well established that they ought to be generally known, and for the safety of navigation observed. It is a general rule when a steamer and a sailing vessel are approaching each other, so that there is danger of a collision, that the sailing vessel has the right of way, and she is bound to hold on her course, and it is the duty of the steamer to take the necessary precautions to avoid a meeting. If this is not done, *prima facie* she will be deemed in fault. It has been so repeatedly decided by the Supreme Court—*St. John* v. *Paine*, 10 How. 557; the *Steamer Oregon* v. *Rocca*, 18 How. 570; *Crockett* v. *Newton*, 18 How. 581.

Another general rule is that where both vessels are approaching in directly opposite directions, with the wind fair, and there is no danger of a collision, each vessel is to pass to the right, and this rule is applied in all ordinary cases, whether both are sailing vessels or both steamers, or one moved by the wind and the other by steam. There are peculiar cases that form exceptions to all general rules. But in all ordinary cases it is of great importance to the security of navigation that these general rules should be observed. Then each party, knowing what he is bound to do, and what he has a right to expect of the other, there is no danger of their acting at cross purposes, but both concurring in the same mode of guarding against danger, a collision is avoided with ease and certainty. But as it must sometimes happen that the danger

may be avoided with equal ease and certainty by either one of two manœuvres, if there be no general rule governing the discretion of the pilot, there being no opportunity for consultation, they are just as likely, without any impeachment of their judgment, to choose opposite manœuvres, which will be sure to produce a collision, as they are to concur in the same, and thus avoid it. And hence the importance of known rules of navigation. Thus, when two steamers are approaching each other directly ahead, by a regulation of the Trinity masters, each is required to put her helm aport and pass to the right, though it might be just as easy, perhaps, to pass to the left as to the right. *The Shannon*, 1 W. Rob. 463. The High Court of Admiralty adhere with inflexible rigor to these general rules, and it was said by the Trinity master that if they had always been observed in practice, it would have prevented a great number of accidents that have occurred. Our Supreme Court seem disposed to uphold them with equal constancy. *St. John* v. *Paine*, 10 How. 581, 583. If, as is justly observed by Mr. Justice McLean, in the case of the *Oregon* v. *Rowe*, 18 How. 572, where this rule of passing to the right was drawn in question, that if the courts allow exceptions, unless in extreme cases, the mind of the helmsman immediately becomes doubtful and hesitating, and more danger will result to navigation by leaving the matter to the judgment of the pilots, than by enforcing the general rule in all cases where it is practicable.

Let us apply these well-known established rules of navigation to the present case. The vessels were approaching each other in precisely opposite directions. The brig was sailing in a course N.N.E. immediately before the wind; the steamer was on a course S.S.W., with the wind dead ahead, but a steamer being moved by paddles, and not by the wind, is always considered as sailing with a fair wind. The pilot of the steamer says that when he first saw the brig she was 2½ points over the steamer's larboard bow. If so, and both vessels had continued their course, one would have passed to the larboard of the other, that is to the right. But the pilot

changed the course of the steamer two points to the right, which would give the brig more room. This was just what the rules of navigation required of him if there was a possibility of a collision. The mate of the brig says that he first saw the steamer's light directly ahead at the distance of about three-fourths of a mile, and immediately changed his course two points to left. But the rules of navigation required him, if he knew it to be a steamer's light, to hold on his course, and as the steamer carried four lights, he could hardly with common attention have mistaken it for the light of a sailing vessel. If he mistook it for the light of a sailing vessel, then he should have put his helm a-port and passed to the right.

It appears to me that in any view that can be taken of the case, the brig was in fault.

Decree that the brig is liable for damage.

Butler, for libellant.

Rand, for respondent.

THE WILLIAM D. RICE.

A court of admiralty has no jurisdiction to try questions of equitable title to vessels, or to enforce the equities between mortgagor and mortgagee of vessels; it can only pass upon the legal title.

DISTRICT COURT—MASSACHUSETTS DISTRICT, NOV., 1857.

WARE, *Judge.*

This is a libel for the possession of the Brig William D. Rice. The libellant alleges that he is the true owner, and formerly had, and ought still to have, the possession. But the brig is now in the possession of Simeon M. Mitchell and Nathaniel Heath, claiming title under a pretended sale by one Edwin H. Rice, in fraud of the libellant.

The libellant deduces his title from Edwin H. Rice. It is alleged that while the brig was on the stocks, Rice, the builder and owner, on the 15th of August, 1856, mortgaged the vessel to the said Simeon M. Mitchell, George S. Chaloner and Frost Warren, in trust to secure the payment of a note to Nicholas Mason, of $2125; that Mason, in October following, assigned all his right and interest in said note and mortgage to the libellant; that afterwards two of the trustees, Chaloner and Warren, on the 6th of April, 1857, assigned the note and mortgage to the libellant, but that Mitchell fraudulently concealed the note and refused to join in executing the assignment of the mortgage; that on the 1st of November, the libellant appointed Mason his attorney, with power of substitution, to collect the note and foreclose the mortgage; that Mason, March 7th, substituted Wm. A. Richardson, who, with the knowledge and consent of the libellant, took possession of the vessel then on the stocks, and foreclosed the mortgage.

In July, after the foreclosure, Rice, with Mitchell and others, it is alleged, launched the vessel against the will of the libellant, and Heath fraudulently procured for the brig a register under her

present name (after she had been registered under the name of David Ransom, in another port), under pretended claim of ownership on the part of Heath.

The libel concluded with a prayer that the brig may be delivered to the libellant, and for such further relief as to law and justice appertain. To this libel exceptions are filed by the claimants in substance: 1st. That the libel does not show a title in Ransom, nor that he is entitled to the possession. 2d. That this court has not jurisdiction to try the question whether the mortgage has been foreclosed. 3d. That the court has not jurisdiction to try the question whether Ransom has an equitable title, and to enforce the same. No right of possession is claimed by the libel independent of the right of property. The court is therefore called upon to determine whether the title is in the libellant as preliminary to the delivery of possession.

That courts of admiralty in this country have authority to pronounce on the title of vessels is, I suppose, too well established to be questioned. But when this is said, it is the legal title only that is meant. Mason's assignment to Ransom of all his right and interest in the note to him and the mortgage to trustees for his security, did not give him a legal title to the vessel. It gave him only a right to have that interest which Mason had transferred by the trustees, and that interest was not an absolute title, but only a title in mortgage. But the assignment of the mortgage by two of the trustees only was wholly inoperative. It transferred nothing. *Wilber* v. *Almy*, 12 How. 120; 2 Story's Equity, § § 1230, 1231. It is alleged that the third trustee fraudulently refused to join in the assignment; but if so, I take it to be quite clear, that the court has no authority to compel him to join. The power to compel a specific performance of a contract in the execution of a trust is within the peculiar and exclusive jurisdiction of courts of equity. A court of admiralty has no such power. This article does not show any such interest in the vessel as will enable a court of admiralty to take jurisdiction of the case.

The libel then sets out another title, that the libellant has the proprietary interest in the brig under a foreclosed mortgage. In the case of the *Bogart* v. *Steamer John Jay*, 17 How. 399, it was decided that a court of admiralty had not jurisdiction to order the sale of a mortgaged vessel to pay the mortgage debt, nor to foreclose the mortgage by a decree, and transfer the property and possession to the mortgagee. In that case the vessel was mortgaged by the purchaser to secure the payment of the purchase-money. The libel contained two prayers for relief. The first was for a decree for the payment of the unpaid purchase-money, and that the vessel, with her equipments, might be condemned to pay the same. This would have been the proper prayer if the mortgage had been a maritime hypothecation. The second was that the steamer might be decreed to be the property of the libellants, and the possession be delivered to them, which would have been a strict foreclosure. The court decided that, sitting as a court of admiralty, it had not the authority to grant either prayer. It could neither order a sale, as in the case of maritime hypothecation, nor by a strict foreclosure, make a judicial transfer of the property. The court quoted and adopted the doctrine of Sir John Nichol, in the case of *The Neptune*, 3 Hagg. 132, that the admiralty has no jurisdiction to decide on questions arising out of the mortgage of vessels between mortgagor and mortgagee.

The mortgage of a vessel to secure the payment of a pre-existing debt, does not rest on a maritime consideration, nor is it made a maritime transaction by reason that the thing mortgaged is a necessary instrument in carrying on maritime commerce, and used exclusively for that purpose. It is as purely a land transaction, as the mortgage of any other chattel. It is not like the implied mortgage, or hypothecation of a maritime lien, when the consideration is purely maritime, as the lien of seamen for their wages; nor is it like the lien of material men, where the ship herself, in the view of the maritime law, is considered as a primary and principal debtor. In all these maritime hypothecations, there is some

resemblance to a common mortgage. The creditor is considered as having a *jus in re*, a proprietary interest, in the things, but it is a qualified right of property. It is simply a right to be paid out of the thing, the *res* itself being treated as the debtor. The proper relief is that the thing be sold to pay the debt, and when that is paid, the thing is free. But with some points of resemblance, there is a clear and broad distinction. A mortgage is the conditional transfer of the whole property, and not of so much of it as is sufficient to pay the debt, and by a breach of the condition the title in law becomes absolute to the whole. Nothing remains in the mortgagor but an equity of redemption. But a marine hypothecation, whether express or implied, transfers to the creditor no more of the thing than the portion of his debt, and that is to be ascertained by a sale. (There is nothing known in the contract, as I understand it, like a proper foreclosure.) There is no other mode of carrying it into execution but by a sale.

Such being the nature of a mortgage, and so broadly discriminated from the analagous security of a maritime hypothecation, and having nothing maritime in its consideration, the courts have held that the rights of parties under such a contract do not fall within the jurisdiction of the admiralty.

But it is argued by the counsel for the libellant, that the court having an unquestioned right to pronounce on the title to vessels, it may decide other questions that arise as incident to the principal questions which, standing by themselves, are not properly of admiralty cognizance; as in this case, it may take notice of the alleged fraud, though the jurisdiction over fraud, in itself and simply considered, belongs to another tribunal. This, with proper limitations is undoubtedly true. But the difficulty in this case is, that the party in his libel admitting the whole to be true, has not shown a legal title, the only one that gives the court jurisdiction, but has shown at most an equitable right to have a legal title. Now, in order to have that title legal, the court must exercise the powers of a court of equity, by compelling a conveyance. This it cannot do.

If this were done, the court would have possession of the cause, and might proceed to consider whether it would take notice of the alleged fraud as incidental to the principal question. But until the court is in possession of the principal cause, it has no incident, and without encroaching on the exclusive jurisdiction of a court of equity, it cannot get possession of the cause.

My opinion is, that the libel must be dismissed with costs.

S. J. Gordon, for libellant.

B. R. Curtis and *C. E. Pike*, for claimants.

THE VELONA.

When a ship, in consequence of a disaster occasioned by the dangers of the seas, is obliged to put into a port for repairs, if they are such as will require considerable time, the master, for the interest of the shipper, may sell such part of the cargo as is of a perishable nature.

The shipper may recover the proceeds of the sale by a libel against the ship.

In such case no freight is due to the master.

The only case in which a *pro rata* freight is due, is when the merchant voluntarily accepts his goods at an intermediate port, not when they are forced on him by necessity.

December, 1857.

WARE, *Judge.*

This is a libel on a bill of lading. The libellant shipped at Boston, on board the Velona, 129 220-2000 tons of ice, to be carried and delivered at Savannah. The vessel sailed in February last, and on her voyage met such severe gales and was so much injured by the violence of the seas that she was obliged to put into the port of Norfolk for repairs. In that situation the master had a right to repair his vessel, if it could be done in a reasonable time, and proceed on his voyage to deliver his cargo, or he might tranship it and send it in another vessel, and thus perform his contract and earn freight. He did neither, but he called a survey on his vessel, and it was found by the report of the surveyors that the repairs required were so considerable, and would require so much time, that he sold the ice at Norfolk.

In such a case of disaster, if the cargo is of a perishable nature, and his own ship cannot in a reasonable time be repaired, the master may either sell or tranship the cargo. But it is said that he is not absolutely bound to send forward the cargo by another vessel, but that he ought, as a faithful agent, to do that which will be most for the interest of the merchant. The master is not ordina-

rily the agent of the shipper for any other purpose than that of carrying and delivering the goods. But in these cases of unforeseen and unprovided necessity, as they have been called, the law clothes him with the authority of a supercargo, and he is to make such a disposition of the cargo as will be most for the interest of the merchant. The *Gratitudine*, 3 C. Rob. 259, 262. In this instance he sold the ice, and I do not understand that any complaint is made that he did not act discreetly.

The libel claims damages for the non-delivering the cargo according to the tenor of the bill of lading. But the contract was safely to deliver it, the dangers of the seas excepted, and these have prevented the master from performing his contract. He is not liable, therefore, for a breach of his contract. But by the sale of the ice a sum of money has come into his hands, to which the shippers have a claim, and my opinion is that it may be recovered in this action against the vessel. *The ship is bound to the merchandise and the merchandise to the ship.* This vessel having received the goods must account for them.

This is not denied, but it is contended on the part of the respondents that they are entitled to deduct from the proceeds of the sale either the entire freight stipulated for in the bill of lading, or at least a *pro rata* freight. The contract by a bill of lading is an entirety, and the general principle of the common law is that an entire contract cannot be apportioned. Until the whole is performed nothing is due. *Powell* v. *Cutler*, 6 Tenn. 320. But by the maritime law, the contract for the transportation of goods, whether by a charter party or bill of lading, admits of an equitable apportionment in one case. When a vessel meets with a disaster by which she is obliged to put into a port for repairs, if the owner of the goods then voluntarily receives them, instead of requiring the master to carry and deliver them at the port of destination, the master is entitled not to the entire but to a *pro rata* freight. It is on the ground that the merchant voluntarily excuses him from completing his contract. The master is then equitably entitled to

a compensation for what he has done, so far as the other party has derived a benefit from it. But the acceptance to give this right to the master must be voluntary. The cases cited in the argument establish this beyond a question.

The *Nathaniel Hooper*, 3 Sum. 550; *Huntin* v. *The Union Ins. Co.*, 1 Wash. 530; *Vlierboom* v. *Chapman*, 13 Mes. and Wels. 230. In this case there was no option left for the merchant, but the goods were sold from necessity to save them from a total loss.

To escape from this conclusion it is contended for the libellants, that the misfortune that had happened to his ship imposed on the master the responsibility of acting as an agent for the benefit of all concerned; that he thus became the agent of the shipper to make the best disposition of his goods, and that as such he might consent for him to accept the goods at Norfolk. But the agency, which in such cases is thrown on the master by the law, is an agency of necessity, and extends no further than the necessity requires. It is an agency like that of the *negotiorum gestor* of the Roman law, a person who intervenes in the business of another without a previous mandate. The principal will be bound by his acts so far as they are proper, judicious, and beneficial to him, either in preventing a loss or procuring him a benefit. It is an agency by which he has a right to act for the benefit of his principal, but not to charge him with a burthen. So, in this case, the law made the master the shipper's agent to sell the ice, to save him from a total loss, but it did not make him the merchant's agent to accept the goods at a port of necessity, to excuse him from performing the whole of his contract, and thus charging him with freight. The case of *Vlierboom* v. *Chapman* is a perfect parallel to the present. A cargo of rice was shipped at Batavia for Rotterdam. The ship was disabled in a tempest, and put into Mauritius for repairs. The rice was damaged by sea water, and to prevent a total loss was properly sold by the master. The owners of the ship claimed a *pro rata* freight; but the court, after taking time to consider the case, held

that no freight was due, on the ground that there was no voluntary acceptance of the goods by the owners. The case clearly negatives the idea that the master had any power, as their agent, to accept for them.

The decree must be for the full amount of the sale of the ice, deducting the necessary and proper charges of sale.

Bangs, for libellants.

Pike, for claimants.

LEWIS *vs.* THE SHIP ORPHEUS.
JONES *vs.* SAME.
YOUNG *vs.* SAME.

When property is in possession of a State Court it is exempted from the process of the United States Courts.

The nature and kind of possession which an officer is bound to keep of personal property attached to save the attachment.

March, 1858.

WARE, *District Judge.*

The first question which arises in these cases, is whether the court has jurisdiction. The right of the court to take cognizance of the subject-matter is not questionable; but the Orpheus was attached under process from the State Court on the 5th of March, and she was arrested by the marshal under process from this court, on the 15th. If the vessel, at the time when the marshal served his precept was in the custody of the sheriff, it is well settled that the arrest of the marshal was illegal and void. The case of the *Robert Fulton*, 1 Paine, 620, and that of the *Oliver Jordan*, decided at the last term of the Circuit Court in Maine are directly in point. It is said by the Supreme Court, that under our system of government there is no mode of preventing an embarrassing and dangerous conflict of jurisdiction between the courts of the States and those of the United States, but to consider personal property, which is in the custody of one to be withdrawn from the process of the other, except in those special cases provided for by statute. (Act of March 3, 1833, vol. 4, page 634.) 3 Peters, 299; *Hagan* v. *Lewis*, 10 Peters, 401; *Pulliam* v. *Osborne*, 17 How. 471.

To meet this difficulty, it is said that in the proceedings under the State process there were fatal irregularities and defects, which

render the whole proceedings void. But the ready answer is that the case is still pending before the State Court, and the question whether these irregularities are fatal must be decided there, and not by this court. It may be a good reason why these libels should not be dismissed, but allowed to remain on the docket till that case is decided. If the State Court dismisses the suits, on which the vessel was attached by the sheriff, it may appear that the seizure of the marshal was lawful, and these cases proceed to a hearing. But until it is ascertained whether this court has jurisdiction, it would be altogether irregular to proceed to a final decree.

When the sheriff made the attachment he appointed Mr. Jameson keeper, and put him in possession of the ship. The keeper was examined, and he says that he remained keeper for seventeen days, two or three days after the arrest by the marshal. At the time when he went aboard, the ship was unfinished and the carpenters were employed in completing the joiner work. During the whole time the weather was extremely cold, and no fire was allowed in the ship; and on account of the severity of the weather the keeper did not remain aboard during the nights. But as she lay at the wharf the vessel was so high that there was no entrance aboard but by a ladder, which was placed there in the morning and taken away at night, and the keeper was there first in the morning before the ladder was put up, and last in the evening when it was removed. Through the whole period of his custody, in the day time, he was either in the vessel or near her, on the wharf or in a counting-room, where the vessel was in plain sight, and was at no time during the day out of sight of the ship; so that it was impossible for her to be removed without his knowledge. During the whole time joiners were at work on the vessel, and many persons were coming and going to visit and look at her, and others were employed in taking in cargo. Mr. Jameson says that he does not know whether he was in the vessel or not when the marshal made the arrest, he not knowing personally the officer, and that he

did not know of the arrest until two or three days after it was made, when he notified the marshal's keeper of his possession.

Such are the facts with respect to the sheriff's custody, and the question is whether it was sufficient to satisfy the law. My opinion is that it was. The nature and kind of possession of personal property that is required of an officer to preserve an attachment depends on the nature of the property. Light articles of small value may properly be removed and kept in immediate possession. But this is impracticable with large articles upon a ship. All that is necessary in respect to such articles is, that the custody be such as will enable the keeper to assert his possessory rights and prevent its being withdrawn without his knowledge. So it has been adjudged by the Supreme Court of the State. Where heavy blocks of granite were attached and put in possession of a keeper, whose house was within sight of them, and who passed them daily in going to and from his work, this was held to be a sufficient possession without removing them. *Sanderson* v. *Edwards*, 16 Pick. 144; *Hemmenway* v. *Wheeler*, 14 Pick. 408.

It is further contended that whatever objection there may have originally been to the jurisdiction it has been waived by the claimant's stipulation, by which he *submitted to the jurisdiction*. Whatever may have been the effect of a stipulation if it had been purely voluntary, I do not think it necessary to determine. As the subject-matter is clearly within the jurisdiction of the court, if it were wholly voluntary it might be taken as a waiver of any other objection. But with a consent extorted by duress it may be otherwise. It is true that an enforced consent is still consent, *evicta voluntas est tamen voluntas*, but it is voidable. To avoid it in this case, by an objection to the jurisdiction, I admit that the exception must be taken in a reasonable time. In the Admiralty it may be taken by a voluntary plea before answering, or it may be taken in the answer. In this case the objection has been made in the answer, and this is in season.

Is, then, the claimant's consent to submit to the jurisdiction voida-

ble? The facts are these. The ship lay, when she was arrested, at Lewis' wharf in Boston, and being in the custody of the sheriff the arrest was void. She was then bound on a distant voyage, and partly laden. In order to liberate her from the arrest, and to enable her to proceed on her voyage, the claimant entered into this stipulation. But for this the voyage must have been broken up, and the vessel remained in custody for an indefinite time, which the progress of the several suits show must have been from the middle of March to the middle of October, seven months at least. Was this consent, it being the only possible means of liberating the vessel, and saving to the owner a heavy loss, so far voluntary as to deprive him of the right of objecting to the legality of the seizure? I think it was not. It was a consent given under duress and constraint, not of his person but of his property, extorted from his fears, not of personal harm, but of a large pecuniary loss. A court professing to be guided in its jurisprudence by the principles of an enlarged and liberal equity, ought to be slow in lending itself to enforce an engagement obtained by such means. According to Domat, when the violence or constraint under which one acts is such as that reasonable prudence obliges him to surrender some property lien, some right, or some other interest, rather than resist, there is wanting that liberty and equality between the parties, which is required to render engagements binding, and a consent so obtained ought to be annulled. Domat Liv. 1, Tit. 12, sec. 4, *in principia.*

If this stipulation were to be considered as of the nature of a contract, there seem to be strong reasons in equity against enforcing it by the active agency of the court. But in fact it has none of the qualities of a contract. A contract is an agreement entered into by the mutual consent of the parties, but a stipulation is an instrument taken by order of the court; its terms are determined by the will of the court, and not by that of the parties. Consequently it is to be interpreted by the intention of the court only, as to the nature and intent of its obligation. It being an instrument taken in the interest of justice, to sustain the jurisdiction of the court, it

ought not to receive such a construction as would deprive either party of any of his legal rights. This clause, by which the party submits to the jurisdiction of the court, seems to be taken from the stipulation entered into in libels *in personam*, *in judicio sistendi*, or answering to the action, and I think should be held to have the same force and meaning as in that. That required the promissor to remain in court and submit himself to its jurisdiction, as far as he was subject to it when the suit was commenced, no further. If, after the service of the process he acquired a new right of declining the former, that was waived, but it did not deprive him of any right of defense he had when the process was served. *Lane* v. *Townsend*, 1 Ware, 304. The object was to preserve the authority of the court as it then was, and not to enlarge it. My opinion is that any rights which the claimant had of objecting to the jurisdiction of the court when the stipulation was entered into he still retains.

In the present state of facts, it does not seem to me to be proper to dismiss the libels. They may remain on the docket and await the decision of the State Court. If their decision is that the proceedings are so defective that the pending suit must be dismissed, the objection to the jurisdiction of this court may be removed and the case proceed. Or if the parties prefer so to do, the suits here may be discontinued, and they may seek their remedy in the State Court.

Hodges, for the libellant.

Derby, for the claimant.

F. O. J. SMITH *vs.* J. A. POOR.

The acts of the Directors of a corporation in the transaction of its business, are the acts of the corporation. They bind the corporate body, but not themselves personally.

This is when they act within the limits and scope of the powers granted to the corporation. If they exceed these limits, their acts are their own and they are personally responsible, and not the corporation.

Generally a stockholder can maintain no action against the Directors or other agents of the corporation for a misuse or abuse of their official powers, by which the corporate property is wasted. The injury in such a case is a single and indivisible injury to the corporation and not a several injury to each stockholder, and the remedy must be sought in a single suit by the corporation.

An exception is allowed when the acting Directors fraudulently and by collusion refuse to institute a suit, or when they are the wrong doers. Then a suit in Equity may be maintained against the Directors by any of the stockholders suing for themselves and all the other stockholders.

It seems that a stockholder is not debarred from maintaining an action either against the Directors or the corporation for a private and personal wrong to himself, and not a wrong to him as a stockholder, which can be maintained by a stranger.

CIRCUIT COURT.

April, 1858.

WARE, *District Judge.*

This is a suit by a stockholder of the York & Cumberland Railroad Company against the defendants, ten in number, seeking to charge them personally for certain alleged misdoings in the management of the business of the corporation as Directors. The declaration sets forth that on the 12th of August, 1848, the company entered into a contract with John G. Myers and others to make part of the road; that on the 3d of January, 1850, this contract was modified by a supplemental agreement, and on the 5th of August, 1851, all the previous contracts were consolidated into one duly made and binding on the corporation; that four of these defendants afterwards, they being Directors and constituting a majority of the board, well knowing these contracts and that they

were obligatory on the corporation, disregarded and violated them, and particularly on the 15th of May, 1851, removed from office and from the employment of the company one Robinson, who by the terms of the contract was agreed upon and was entitled rightfully to act as chief Engineer in the construction of the road, on the pretense that he made false estimates of the amount of work done by the contractors and refused to pay for the same, in consequence of which the work was stopped, the road left unfinished, and the company involved in expensive and ruinous litigation, so that the stock of the road was greatly depreciated and rendered wholly worthless, and the stockholders became liable for the debts of the company;—and that afterwards on the 11th of November, 1851, the other defendants, claiming to be Directors and acting as such in their official capacity, ratified and confirmed all these misdoings and thus made themselves jointly responsible with the others. To this declaration there was a general demurrer.

The case was argued in writing by *Smith pro se*, and *Evans* for the defendants.

WARE, *District Judge.*

The demurrer for the purposes of this hearing admits the truth of the facts alleged, but denies their sufficiency to maintain the action.

This is an action by a stockholder against the Directors for negligence and misconduct in the management of the affairs of the corporation. The general rule is that the acts done by the officers of a corporation are the acts of the corporation itself. A corporation aggregate is merely an artificial person without any natural organs of action and can act only through the instrumentality of natural persons. The old and primitive rule of the common law was that it could only speak and act by its common seal, but even this must be affixed to the paper or parchment by a natural person acting as its agent.—2 *Kent Com.* 222, 2 *Black*, 472. The law or charter from which it derives its existence, points out who these agents

shall be, usually as in this case, a board of Directors. It is only through these that it can exercise the powers and faculties with which it is clothed by the law.—One of these faculties is that of acquiring rights and coming under obligations by means of contracts. But these contracts are made through the instrumentality of the Directors or other authorized agents, though when made they are the contracts of the corporation; all the rights and obligations which result from them accrue to the corporation and not to the instruments by which they are made. The agent is the mere conduit-pipe or the electric wire by which the corporate sanction passes into the contract. These contracts thus made are also performed or violated through the instrumentality of agents. The violation or breach of the contract is just as much an act of the corporation as the making of it or carrying it into execution. All the rights acquired by the contract inure to the benefit of the corporation, and all the liabilities resulting from its breach rest upon it. The agents by which these are effected are equally strangers to the rights and responsibilities. Such is the familiar and well-established doctrine of the law.

On principle, then, it is not easy to see how the Directors can be liable to this action. They are the mere instruments of the corporation both in making and breaking the contracts. And the decisions of the courts are in comformity with this theory.—*Angel and Ames on Corporations, ch.* 9, *sec.* 311—312. Nor, as I understand the plaintiff's argument, does he controvert the general doctrine. He relies on a distinction to take his case out of it.

While the Directors act within the scope and limits of the powers granted to the corporation, it is not denied that as its general agents, their acts bind the corporate body, but do not bind themselves personally. But when they go beyond those powers and do acts not authorized by the charter, then their acts bind themselves and do not bind the corporation. And on this distinction the plaintiffs seek to hold the Directors personally responsible in this action.—*Angel and Ames, ch.* 9.

The question then arises, whether the case comes within the distinction. The act complained of is a breach on the part of the Directors of a contract binding on the corporation, and damages are sought for the loss and injury resulting from it. But this was an act done under color of official authority; for the Directors act officially as much in violating a contract as in making and carrying it into execution.—They were not, therefore, acting beyond the scope of their power, but only exercising it wrongfully; it may be from an error of judgment, or it may be wantonly and maliciously. It was at most an abuse of their authority, and not a usurpation of ungranted power. Such an abuse of power may be a wrong done to their principal, and if wantonly done they will be answerable for every loss or damage resulting to the corporation. But it is not the less the act of the corporation and binding upon it in relation to third persons. The injury done to such parties is an injury done by the corporation, and the corporate body is alone responsible. *See Angel and Ames—chap.* 9, *pp.* 311—312, and the authorities therein cited. This would be an answer to the action if it were by a stranger.

But in this case the plaintiff sues as a stockholder for an injury not peculiar to himself but common to all the stockholders; that is, an injury or damage to the common corporate property.—The case is unlike that put at the argument of the Directors using a patented article, of which a stockholder is the patentee. The injury in such a case is not done to him as a stockholder but as a patentee. It is an illegal and fraudulent appropriation of his private property. It may be admitted that for such a wrong a stockholder would not be debarred of any remedy either against the Company or Directors; that would be open to a stranger, for it is as such that he sues, and nothing is more common in law than for a person to have a right of action in one character which he cannot maintain in another, as a trustee, Executor, or Administrator. The plaintiffs right of action in such a case does not grow out of his relations to the company. But in the case at bar the wrong complained of is peculiarly a

a wrong to the corporation. It is the common corporate property that has been depreciated. The injury to the plaintiff is derivative and secondary, and affects him so far only as he is entitled to a share of that property. In such a case a suit for any neglect or misfeasance of the Directors or other officers of the corporation must be against the company and not against the individual wrong doers. *Smith* v. *Wood*, 12 *Metcalf*, 371; *Smith* v. *Poor.—Maine R.* 40, 415. A stockholder cannot maintain an action against the Treasurer of the company for wrongfully withholding from him a dividend, for the Treasurer acting under color of office, his act is the act of his principal. The rule of law in such a case is *respondant superior*. *Francis* v. *Fuller*, 23 *Vick.* 102. To prevent a failure of justice, and for that cause only, an exception is made to the general rule when the Directors, by collusion, refuse to prosecute, or when they are themselves the persons charged with the neglect or misfeasance. Then any of the stockholders may file a bill in Equity against them, in their own behalf and in behalf of all the other stockholders, and in this case the corporation as the party having the legal and direct interest, must be brought before the court as a party defendant. *Robinson* v. *Smith*, 3 *Paige*, 233, per Walworth Chancellor. But this is a suit at law and if it can be maintained every stockholder may, for the same reason, have his separate action, and a door be opened to an indefinite multiplicity of suits.

The case of *Smith* v. *Poor*, recently decided by the Supreme Court of this State, in one of its aspects bears a very close analogy to the case at bar. There the plaintiff sued the Directors as a contractor for a breach of contract; and also for loss and damage sustained by him as a stockholder, for alleged fraudulent acts done by them under color of official authority. The court ruled that in neither aspect could the action be maintained; that for official misconduct of the Directors the company was alone responsible to a stranger. And that an individual corporator, who has suffered damage, even in a private contract, by the misconduct

or fraud of the Director acting *colore officii* can maintain no action personally against them, but his only remedy is against the corporation. The present case is even stronger against the plaintiff than that. In that the injury set forth was substantially personal and private to himself. Here it is primarily and peculiarly an injury to the artificial or ideal person of the corporation.—In strict and technical law the corporation is the only party injured, and the plaintiff and other stockholders suffer wrong and damage only as component parts and members of this ideal personality. Technically, also, the injury is simple and entire, a unity, and not several to the members and component parts, and as the injury is an entirety the remedy cannot be apportioned, but must be by a single suit; and in the excepted cases where the stockholders may maintain an action personally against the Directors, all must unite, either actually or virtually, in the suit.

This demurrer is filed by one of the defendants, and it was contended at the argument that it may be sustained on grounds that are peculiar to himself. I have not thought it necessary to consider these, as my opinion is that it is good, on grounds equally applicable to all.

The demurrer adjudged good.

WOOLLY *vs.* THE SHIP PERUVIAN.

A trench excavated in front of the launching ways of a ship, for the purpose of deepening the water, does not make a part of the launching ways, within the meaning of the act of the legislature of Massachusetts of 1855, chap. 231.

And though this was necessary for the launching of the vessel, yet as the trench remains to be used for other vessels, this was not, within the meaning of the act, labor performed in launching the vessel.

The general objects of the act are to give to material men, mechanics and laborers, a lien for all the materials and labor which go into the ship, constitute any part of it, and make up its entire cost.

For this the law constitutes the ship a debtor, and it is what she naturally owes, and it would require the most express and unequivocal language to extend the lien beyond this natural limit.

May, 1858.

WARE, *Judge.*

This is a libel *in rem* against a new ship, the Peruvian, for labor performed in launching her. The libellant alleges that "by virtue of a contract with the builders he performed labor in the launching of said ship to the amount of $150, according to the schedule annexed to the libel, and that this labor was indispensable to the launching of the ship;" and after deducting all credits, there remains due to him $129, for which he claims under the law of the State a lien on the ship.

The answer of the claimants, who are purchasers of the ship, without admitting the labor and services alleged in the libel, denies "that the same, if done, was of a kind or character entitling him to any lien or privilege on the ship."

The actual performance of the labor was proved at the hearing, and the amount claimed was not contested, if any thing can be recovered in this suit. The ship was built at a yard in East Boston, and the water was so shoal in front of the yard where she lay, that it was necessary to excavate the earth so as to give a

greater depth of water to prevent her grounding as she left the ways. The amount of excavation or dredging charged is fifty square yards at three dollars a yard.

This lien is claimed under a statute of Massachusetts of 1855, chap. 231. The material portion of the act is the first section: "Whenever by virtue of any contract, expressed or implied, with the owners of any ship or vessel, or with the agent, contractors or sub-contractors of such owner or any of them, or with any person having been employed to contract, repair or launch any ship or vessel, or to assist them,—money shall be due to any person for labor performed and materials furnished in the construction, launching or repairs of, or for constructing the launching ways for, or for provisions or other articles furnished for, or on account of any ship or vessel in this Commonwealth, — such person shall have a lien on such ship or vessel, her tackle, apparel and furniture, to secure the payment of such debt; which lien shall be preferred to all others thereon, except for mariners' wages, and shall continue until the debt be satisfied." The other parts of the act directing the measures to be taken to secure or perpetuate the lien, do not affect its nature or character.

Whether the lien can be maintained, depends on the construction of the act. The claim is set forth in the words of the law. It is for money due by virtue of a contract for labor performed in launching the ship, with an allegation that it was a service indispensable for that purpose. The statute gives the lien for labor performed in the launching, and for labor or materials in constructing the launching ways. On a strict criticism of the words of the law, this labor cannot, perhaps, with entire propriety, be said to be labor done in the launching of the vessel. It was rather a service performed preparatory to the launching, and whether it was a preparatory work of a kind that can justly be considered as contemplated by the legislature, seems to me to admit of a doubt. It is further argued by the libellants' counsel, that this dredging and excavation of the earth may be considered as labor performed on

the launching ways. But it seems to me to be an unnatural and forced meaning put on the words, to consider an artificial channel made in front of the ways, where the ship is received into the water, as part of the ways themselves. The lien is given for labor and materials for the ways, apparently contemplating only the wooden frame-work or cradle in which the ship rests. There appears to me, therefore, to be some difficulty in maintaining that the service claimed in this libel was of such a character as fairly comes within the meaning of the law.

The statute is evidently drawn with care, and the manifest intention, I think, was to give to material-men and laborers, who have contributed by labor and materials to the construction of a ship, a lien for the price of every article which goes into and makes a part of her, and for every kind of labor that is performed upon or for her, until she passes into the element for which she is destined; in a word, for all, whether of labor or materials, which constitutes the proper cost of the ship. The statute creates a legal hypothecation of the thing, and makes the ship herself a debtor; and when the precautions are taken required by the other sections of the law, the lien adheres to her as a *jus in re* until the debt is paid, into whosesoever hands she may pass.

But this, I think, is generally the whole intent of the law. The debt, for which this *nexus* is given, is the proper debt of the *res*, and is a property in the ship. To that extent the lien creditor is a *quasi* proprietor or owner. It is his own property, which he has never parted with, whether it is due for materials or labor. But it is his property in a qualified sense. The claimant or general owner has his rights also. He may pay the debt, or tender the pay, which will have the same legal effect, and then by operation of law, without any form of transfer, or the consent of the creditors, this special and qualified property passes to him in full and unqualified ownership. The lien does not necessarily or naturally extend to every thing furnished or done for or in reference to the ship, as for the price of tools supplied to mechanics and

workmen, and used in doing the work. The legislature will not easily be supposed to have intended a lien for the price of these; because in that case the payment would operate as a transfer of these tools to the owner as appurtenant to the ship. But the ship has had only the use of them, and for this use has paid in the price of the labor. Such things, though in a loose sense they may be said to be furnished for the vessel, constitute no part of the ship, nor, like a boat or an anchor, are they a natural appurtenance to the ship. They will not, therefore, be supposed to be within the intention of the legislature, unless that intention is clearly expressed. But if such a purpose is unequivocally expressed, I do not see why courts are not bound to carry that intention into execution, whatever their own opinion may be of the utility of the law.

I should feel no difficulty in giving this interpretation as expressing the general intention of the legislature, that is, that the lien extended to all the materials and all the labor that made up the entire cost of the ship, and no farther, but for a single clause in the law. That gives a lien for labor and materials "for constructing the launching ways." Yet the launching ways constitute no part of the ship, nor are they in any way appurtenant to her after she is afloat. They are necessary, it is true, for the launching, and so, in some sense, may be said to be furnished for the ship and to make a part of her cost. But the same may be said of the tools of the workmen, and for a like reason the lien may be claimed as extending to them. *The Kearsarge*, 1 Ware's R., 2d edition, 549. But in each case, on the other hand, the ship has had only the temporary use of these things. The tools remain for further use, and the timbers, of which the launching ways are made, are preserved to be used for launching other vessels. The price of these does not go into the cost of the vessel. All that the ship naturally owes to the launching ways is for their temporary use and the labor of putting up the frame-work. This being for the special benefit of the ship, is a proper charge against it, and a proper subject of the lien. Yet, the words of the law are express, and in a statute drafted with such

evident care, I find some difficulty in determining that the legislature did not mean what they have said.

But another question remains, whether this service comes within the descriptive words of the law in their fair and ordinary meaning. It is giving a forced and unnatural meaning to them, to call this trench a part of the launching ways. It is more easy and natural to consider the work as part of the labor of launching, and if the trench was made exclusively for this ship, if the whole use of it was consumed when this ship was launched, it might fairly be considered as part of the cost of the launching. But after it is used for this ship, the trench remains as a permanent improvement of the ship yard. If the claimant and owner pay for it, it does not become his as an appurtenance of the ship. It continues the property of the owner of the ship yard. It would require the most express and unequivocal language to extend the lien so as to include such work. This would be an infringement of the general principles of law and justice. *Quod contra rationem juris receptum est, non est producendum ad consequentias.* Dig. 1, 3, 14.

Upon the whole, my opinion is that this trench formed in front of the ship-yard cannot be considered as part of the launching ways, nor can the making of it be considered as labor performed in the launching, within the meaning of the law.

The libel must be dismissed with costs.

S. J. Thomas, for libellant.

J. A. Andrew, for claimants.

THE UNITED STATES *vs.* THE PARYNTHA DAVIS.

The fishing business is a trade within the meaning of the License Act of Feb. 18, 1793. The meaning of the word trade in the Act, is equivalent to employment, and every act of trade beyond the scope of the license subjects the vessel to forfeiture under the 32d Section of the Act.

Since the Act of May, 1828, authorizing a special license for the mackerel fishery, that is a trade distinct from the cod fishery.

A vessel with a cod-fishing license may take mackerel for bait, or for the consumption of the crew, but if she engages in this fishery as a business, she is liable to forfeiture.

This case was very elaborately argued by *Shepley*, District Attorney, for the United States, and *B. F. Hallett* for the claimants. The facts are fully stated in the opinion of the court.

July, 1858.

WARE, *District Judge.*

This was a libel *in rem* for a forfeiture. The schooner was regularly licensed on the 22d of September, 1857, in the collection district of Barnstable, in Massachusetts, for carrying on the cod fisheries, and on the 11th of October was seized, while lying in Hog Island Roads, in Portland, where she had gone to make a harbor, and for water, on a charge of being engaged in a trade other than that for which she was licensed. It was proved at the hearing, that the schooner took out a cod-fishing license the 27th of March, and was employed under that till the 23d of July, when it was surrendered, and a license taken for the mackerel fishery. This was held until the 22d of September, when it was surrendered and another license for the cod fisheries taken. It was while she held this license that she was seized on the 11th of October.

The schooner sailed from Wellfleet on the 22d of September, completely equipped for the cod fishery, as is stated by the wit-

nesses for the claimants, and as appears from other testimony, as well prepared for the mackerel fishery; and after stopping at Townsend over Friday night, sailed for the East Saturday morning. She tried for cod on the way, but took none, and went into Wellfleet Saturday night and lay there over Sunday. Monday she went to Long Island and remained there and in the waters about there about three days, trying for cod, but took very few, but she took two or three barrels of mackerel for bait. Thursday she went West without fishing, and stopped at Fox Island at night. There she was detained by the state of the weather the next day. Saturday she continued her westward course, and once in the forenoon and once in the afternoon tried the codfish, but found none. While fishing for cod a school of mackerel came to the top of the water, and three or four barrels were taken for bait. At night they went into Townsend and remained there over Sunday. Monday she went out and tried for cod about Damariscove, but caught not more than half a dozen, and left for Seguin, and she caught a barrel of mackerel for bait. Leaving Seguin Tuesday they were off Portland trying for cod without taking more than half a dozen, but they took half a barrel of mackerel. They remained on this fishing-ground, fishing for codfish in the day time, and lying to at night. They got very few cod, but one day took three or four wash-barrels of mackerel. While they were seeking for cod, mackerel from time to time came to the surface of the water, and then a few were taken for bait. Saturday two or three codfish were taken, and three or four barrels of mackerel. Saturday evening they went to Portland for a harbor and a supply of water. Sunday morning the vessel was visited by the boat of the revenue cutter Caleb Cushing, and on an examination of the schooner her license was taken away, and Monday the vessel was seized.

Such, in substance, is the account, given by Lombard, one of the crew, of the vessel's employment from the time that she took out her license in September, until she was seized on the 11th of October. The depositions of two others of the crew were produced

at the hearing, but their statements do not materially vary from that of Lombard.

The allegation in the libel on which a forfeiture is claimed, is founded on the 32d section of the act of February, 1793, commonly called the License Act. The act provides generally for the licensing and regulating of vessels to be employed in the coasting trade and fisheries, and the section mentioned has a provision that if any licensed vessel shall be 'employed in any other trade than that for which she is licensed, she shall be forfeited.' At the time of the passage of this act, and down to the year 1828, the law provided but two forms of fishing licenses, one for the cod and the other for the whale fisheries. All the bank and coast fisheries were carried on under a cod-fishing license. But by that time the mackerel fishery had grown up to an important branch of business, and a special license was provided for that trade. A case arose in this District soon after the passage of the act of 1828, which involved the consideration of the construction and effect of that law. In that case it was held that the fishing business was a trade within the true intent and meaning of the 32d section of the license act of 1793. And that since the act of 1828, providing a special license for the mackerel fishery, that by itself constituted in a legal sense a trade separate and distinct from cod fishing, and required a special license to protect the vessel from the penalty of the law, and that when a vessel under a cod-fishing license engaged in the mackerel fishery as a business, she was employed in another trade than that for which she was licensed, and thereby became liable to forfeiture. That case was carried by appeal to the Circuit Court, and the decision was then affirmed, and it has been considered as settling the law on this subject. The Nymph, 1 Ware, 259; S. C. 1 Story, 516. Some doubt was indeed thrown over the doctrine of that case by the subsequent case of the Reindeer. Law Reporter, New Series, note 5, pp. 235–250. A doubt was then suggested, whether, as the cod and mackerel fishing business were both of the same generic nature, they could properly be considered as distinct and dif-

ferent trades. But it was expressly added by the Court, that it was not its intention to overrule the case of the Nymph.

The Nymph was under a cod-fishing license, and it was shown by the evidence that about one-half of her time she had employed in cod fishing, and the other half in taking mackerel. It was a case of mixed employment. But it is well-settled by a series of decisions, that any engagement in an unauthorized trade, any employment of the vessel beyond the scope of her license, works a forfeiture. The Active, 7 Cranch, 100, was the case of a vessel under a fishing license, which was loaded in the night, had left the wharf without a clearance, under circumstances which justified the belief that she was intended for a foreign voyage, and for this she was seized and adjudged to be forfeited. See also the Mars, 1 Gall. 237; The Boat Eliza, 2 Gall. 7; The Julia, 1 Gall. 233.

The only question then open in this case, is one of fact. The schooner was under a cod-fishing license, and did she, on her trip commencing Sept. 24th and ending Oct. 11th, engage in the mackerel fishery as a business, or trade, or was she engaged in a mixed business of cod and mackerel fishing? In either case she is liable to forfeiture.

I do not ascribe so much importance to the fact that when taken she had a complete outfit for taking mackerel, for this reason. Her cod-fishing license authorized her to pursue that business in the customary manner, and for that purpose she must have her supply of bait and provisions for the crew, or obtain them in the course of the cruise. And it is the well-known custom of the trade, for vessels in the cod-fishery to supply themselves, in the season of mackerel, with this fish for bait, the fresh mackerel being found to be the best bait for cod. It is also an equally well-known custom for the crew to live, in part at least, on fresh fish. It is not, therefore, a circumstance of suspicion that she had mackerel lines aboard, nor perhaps that she had a full supply for a regular mackerel voyage, as her last trip had been in that fishery. To take mackerel for bait, or for the consumption of the crew, was no violation

of the license. The instructions of the Treasury Department authorize this to be done, and these instructions are in conformity with the previous decisions of the courts. And if, in the course of the trip, it should so happen that somewhat more of mackerel are taken than are consumed in this way, it would be a harsh construction of the law to require the crew to throw overboard a small surplus that may remain, or expose their vessel to forfeiture, provided the cruise had been fairly and in good faith devoted to cod fishery.

The manner in which the crew were employed during the cruise has already been stated from the depositions of three of their number. Part of the time they were employed in fishing for cod, and part of the time in taking mackerel, as the witnesses state, for bait. The proceeds or result of that employment, was shown by the fish found on board the schooner, when she was seized. There was not a single cod found, but there were at least fifteen barrels of mackerel, if not more, for they were not counted. A small part of them were on deck in open wash-barrels, but the greater part were pickled, barreled up, and stowed under deck, as they would be if intended for the market, and not for bait. The cod-lines were put away, but the gear for mackerel-fishery were all rigged and ready for use. On this evidence I find it difficult to be persuaded that the crew had truly, and in good faith, employed themselves in cod-fishing as their exclusive business, and that no part of their time had been occupied in taking mackerel except for bait. I agree with what was said by the Court in the case of the Reindeer, that the fishermen are to be considered with indulgence, and even with kindness. They are a hardy, industrious, careful, and highly meritorious class of men at all times, and invaluable to the country in the times of her greatest need. But there must be limits to this indulgence, and courts of justice are bound to execute the laws.

The unfavorable inferences which not unnaturally follow from the testimony of the claimants, are strengthened and fortified by the evidence offered by the government, of what took place at the time of the seizure. When the Skipper was asked how it happen-

ed, that being under a cod-fishing license, he had mackerel and not cod, what was the object of his voyage, he answered that it was to take any kind of fish that came in his way, and that he had taken mackerel as he had a right to do. His previous trip had been under a mackerel license, and under that he was authorized by the act of 1836, ch. 55, U. S. Laws, vol. 5, p. 56, to take all kinds of fish. But no such liberty is allowed under a cod license. The reason of the difference is, that the mackerel fishery is encouraged by a drawback of the duty on the salt used, but in the cod fishery, as a substitute for this, a direct bounty is paid for the time employed in proportion to the tonnage of the vessel.

My opinion on the whole evidence is, that this vessel was employed, if not exclusively, at least in part, in taking mackerel, not for bait, or for the ship's use, but as the proper business, in the whole or in part, of the voyage, and that consequently she is liable to forfeiture.

NOTE.—This case was appealed to the Circuit Court, and there the decree of the District Court was affirmed at September Term, 1860. 1 Clif., 532.

THE H. B. FOSTER.

In a contract for the hire of a vessel on shares, that is, the hirer to victual, man, have the control of the vessel, and pay over to the proprietors a certain proportion of the net earnings as charter or hire, the general owners are not responsible for supplies or repairs furnished in a foreign port.

But the vessel is liable whether the hirer navigate her himself or employ another master.

Every person who furnishes such supplies or repairs to a foreign vessel is, by the maritime law, considered as contracting with the vessel herself as a principal debtor, as well as with the master and owners.

The natural and legal presumption in such a case is that the creditor looks to the vessel as one of his securities, because no person is ever presumed without proof to renounce any of the securities provided for him by law.

July, 1858.

WARE, *District Judge.*

This is a libel *in rem* filed May 1st, 1857, by Bela Hunting, *et als.* assignees of Charles B. Hunting, against the schooner H. B. Foster, for supplies of ship stores furnished by order of the master in the months of September, October, and November, 1856. The home port of the vessel at the time when the supplies were furnished, was Machias, in the State of Maine, and it appears from the proofs in the case that she was let by the owners to Robinson, the master, by a parol contract to be employed on shares, and that her actual employment was in the coasting trade between Machias and Boston, where the supplies were furnished. The general and well understood terms of this contract are, that the master is to victual and man the vessel at his own expense, is to have the entire control of her, and, after deducting certain port charges, pay one-half of the net earnings to the owners as the hire or charter of the ship. It is well settled by a series of decisions that, when by such a contract the possession and control of the vessel is transferred to

the hirer, he becomes special owner and for the time she is employed nnder it, is liable as such; and that the general owners, the proprietors, are exempted from liability on the master's contract for repairs and supplies; and it makes no difference whether the hirer navigates the vessel himself as master or employs another person. (*Skolfield* v. *Potter*, *Daveis* 395 (2 Ware R., 394), and the authorities therein cited.) But this does not affect the liability of the vessel. That always remains liable whoever may be the absolute owners.

The authority of the master to bind the ship itself by his contracts for supplies and repairs is a principle growing out of the necessities of maritime commerce, and was early incorporated into the maritime law as one of its original elements. The master has the management and control of the vessel, and she may be carried into port where neither he nor the owners are known, or if known, where they have not credit. His duty is to carry the ship on her voyage safely to her final port of destination. If she becomes in want of repairs and supplies to enable her to perform her voyage, these must be provided, and to procure them the master always carries with him the credit of the ship itself. It is for her benefit that they are required, and on principles of natural justice she ought to pay for this indispensable viaticum. This is the view the maritime law takes of the case. Every person who makes such repairs and furnishes such supplies is considered as contracting with the vessel herself. The master binds himself, it is true, for it is his own contract, and he binds his owners, for he is their author ized agent; but the creditor may pass by both master and owners, as he has in this case, and proceed directly against the ship as the principal debtor for whose benefit the services were rendered. In the primitive maritime law there was in strictness no personal liability beyond that of the master. The owners would always exempt themselves from personal responsibility by abandoning their interest in the ship and freight as an appurtenance to the ship. The authority of the master extended no farther than to bind the property of the owners entrusted to his management. And such

is now the law of all maritime nations on the continent of Europe. *Ordonnance Louis*, 14, Liv. 2, Tit. 8, Art. 2, and *Valin Commentary*, vol. 1, p. 568. The Rebecca, 1 Ware's Rep. 187, where the authorities are cited.

This view of the subject furnishes an answer to one of the positions of the claimant's counsel, that the liability of the ship continues only to the end of the voyage, for which the supplies were provided. If it is the proper debt of the ship, why is she not liable like any other debtor until the debt is paid? There is no statute of limitation raising a bar in the admiralty. Lapse of time indeed, connected with circumstances, will create an equitable bar. Every man is bound to use reasonable diligence in enforcing his rights. If he does not, and in the free and rapid circulation of property, he suffers other persons to acquire an interest in the subject matter without notice of his rights, the just penalty of such neglect may be the forfeiture of his rights, or postponement of them to the equitable claims of others. Ships, it is well known, are frequently changing owners; still more frequent are claims and rights against them for wages, repairs, and supplies. All such claims ought to be enforced in due season, and indeed promptly, and not be allowed to lie as secret liens and charges, which may operate as a surprise, if not a fraud on others. It is such considerations that have led able and learned admiralty judges to say that they will look narrowly into a lien claim of this kind if it is sought to be enforced at a later time than the termination of the voyage for which the supplies were furnished, and not because the claim then necessarily and legally becomes stale. *The Utility*, Blatchford and Howland, 218; *The Boston*, *id.* 327.

But there is another view of the subject which requires consideration. The power of the master extends no farther than to charge the vessel with such supplies as are necessary, that is, such as are suitable and proper. This is a power that is firmly sustained as indispensable for the purposes of navigation, but it is a power easily liable to abuse, and is therefore

to be critically watched. The creditor is safe in trusting to the vessel only when the supplies are necessary, that is reasonably fit and proper, and in such amount as may fairly be supposed to be required for the vessel's use, and he is bound, as in case of bottomry, to use reasonable diligence to inform himself on this point. The reason for this requirement is the same in both cases, though perhaps it would be enforced with somewhat less stringency in the case of a simple maritime lien, than in one of bottomry with marine interest. *Pratt* v. *Reed*, 19 How. 359. If, therefore, the supplies furnished are not necessary, or if they are furnished in an amount beyond the needs of the ship; in the first case the ship will not be liable at all, and in the second not liable at least for the excess beyond her reasonable needs.

The necessity of such supplies and provisions as are the subject of this suit cannot be questioned. But there was a suggestion at the argument that the amount was greater than was required for the consumption of the crew. The vessel was trading between Boston and her home port, Machias, where the family of the master resided, and she would naturally be expected to procure a part of her supplies there. But even on that supposition, I do not think that the amount charged is such as would awaken in the mind of the creditor, who furnished them, a suspicion that the master was procuring provisions for other purposes than that of feeding his crew. But then we have the direct testimony of the master himself, that a considerable portion of these supplies were actually carried home to his family, and not used in the vessel. If that had been known at the time to Hunting, or if he had reasonable grounds to believe from the amount furnished, or other circumstances that such was the fact, it would, I think, have been a fatal bar to this suit. It would be a credit not authorized by law and a fraud on the vessel, for that is liable only for what is for her own use. But if they were originally furnished in good faith for the vessel's use, the creditor is not answerable for a misapplication by the master to which he was not a party. To justify

a loan on bottomry there must be an apparent necessity, and the loan must be made in good faith to relieve that necessity, but the lender is not affected by the master's misapplication of the money. *Emerigon Contrāts a la grosse*, chap. 4, sec. 8. Admitting, then, that the supplies were thus misapplied by the master in this case, if it was without the knowledge and consent of the creditor, it ought not to affect his claim.

But it is strongly urged that these supplies were furnished under a special agreement on the personal credit of the master alone. This is directly and positively sworn to by the master, and if so, it makes an end to this case. *Modus et conventio vincunt legem.* But it is as positively and directly denied by Hunting. It requires some charity to enable one to believe that both these witnesses have sworn fairly; that there was not intentional falsehood in one or the other. The only other explanation of the contradiction that I can imagine is that there was a conversation on the subject between the parties without their coming to mutual understanding and agreement; that the master ordered the supplies, intending that the charge should be to him personally, but that Hunting, not having consented to it, charged them to the vessel according to his usual practice.

This agreement or conversation took place in the month of June. Between June and September the vessel made three trips, and in each case supplies were obtained of Hunting. Bills of parcels were delivered with the goods charged, as the bills in this case, against the ship and owners. They have been all paid without objection to the manner in which they were charged. The supplies for which this suit is brought were charged in the same manner, and bills of parcels delivered with the goods, and no objection made by the master. Whatever his original intention may have been as to procuring his supplies on his own personal credit, he must be held to have abandoned them. Hunting says that he would not have furnished them on the master's credit alone, and a creditor is never presumed without proof to abandon any of the securities the law

gives him. My opinion on the whole evidence is that the libellant is entitled to a decree in his favor.

Decree $69.00 and costs.

Jewell, for the libellant.

Pike, for the claimants.

THE VINCENNES.

CHARTER PARTY. When a former judgment is relied on as a defence in the Admiralty, it should appear by the record that the precise question or title set up was passed upon in a former suit, not merely that it might have been.

For a ship to be seaworthy for the voyage, she must be manned by a competent master and crew.

In a libel by the owners on a charter-party, for refusing to furnish a cargo on the pretence that the ship was unseaworthy, the burthen of proving the seaworthiness is upon the owners.

When the question of seaworthiness is in issue, evidence of the performance of voyages, immediately before or after that contemplated is inadmissible, except so far as they may offer just inferences as to her actual condition at the time.

July 13–17, 1858.

WARE, *District Judge.*

This is a libel on a charter-party. Henry Jones & Co., merchants in Boston, chartered the brig Vincennes on the 22d of December, 1853, then lying in that port, for a voyage from Baltimore to Boston. The vessel was immediately to proceed to Baltimore, where the charterers agreed to furnish a full cargo, both under and on deck, of white oak ship-plank, of the dimensions mentioned, with treenails for small stowage, and to pay freight at the rate fixed by the contract on the delivery of the same at Boston. The lay days for loading were to commence two days after the master reported his vessel ready to receive the cargo; and then that was to be delivered as fast as it could be received and stowed by the crew, and twenty dollars a day was to be paid by the charterer for every day's detention of the vessel for default in furnishing the cargo. Under this charter the brig arrived at Baltimore, and was ready to receive her cargo the 31st of December, and began to load Jan. 2d. The loading was continued to the 6th and 7th, when she was about or nearly one-half ready, and then Abbot, who furnished

the cargo, and for whom the brig was chartered, refused to furnish any more on the ground that the vessel was unseaworthy. The real reason for Abbot's refusal to proceed with the loading, it appears from the evidence, was the difficulty he found in getting insurance. The owners were informed, and negotiations were entered upon to obviate the difficulty with such success that the loading was renewed on the 20th, but was again suspended on new misunderstandings, on the 22d, and not resumed after. Abbot demanded the re-delivery of the cargo, which was refused by the master, who was preparing to sail with what he had, when on the 11th of February, the vessel and cargo were taken into the possession of the sheriff on a writ of replevin sued out by Abbot against the master. The cargo was discharged by his officers, and the brig restored to the master on the 16th. The brig was then loaded with a cargo of coal and wood, by Mr. Cunningham, a commission merchant, and sailed for Boston, where she arrived on the 15th of March.

This suit is brought by the owner of the ship against the charterer, for a breach of the covenant of the charter-party. The first ground of defence relied on, is that the subject-matter of this suit has already passed *in rem judicatam* in the replevin suit at Baltimore. The defense of *res judicata*, whether made in the form of a plea in bar, or offered as evidence on the general issue to avail this party, must be between the same parties, and the judgment must be on the same question or point that is sought to be litigated in the new action. That was a suit by Edwin A. Abbot against Allen Gatchel. The parties were not, therefore, the same. But it is said that though nominally different, there is a substantial identity between the parties to that suit and this; that Gatchel, as master of the ship, was the representative of the owner; and that between Abbot and Jones & Co., there was such a relationship of principal and agent, that one was the legal representative of the other. But even admitting this to be the case, and this objection to be surmounted, there is another difficulty that appears to me to

be not easily overcome. That was a suit by Abbot founded on the right of property, and claiming the possession on the ground of his proprietory right. Gatchel pleaded first, the general issue; secondly, a special plea denying the property to be in Abbot, alleging that it was in Jones & Co., and he claimed the rights of possession as their agent. In a third plea he claimed property in himself. Issues were joined on these pleas, and found for the plaintiff. Nothing more appears by the record to have been necessarily decided in that case, than that the right of property was in Abbot. But this suit is founded on a contract, not touching the proprietory interest in the goods, but for their transportation; and the right of possession is claimed by the libellant under this as bailee; a right to detain and hold the goods by virtue of a lien for what was due to him on them under the contract of bailment. It does not appear that these rights of the libellant were necessarily decided in this suit. The pleading opens an entirely different ground of defence. But when a former judgment is relied on as a defence, whether presented as a plea in bar or as evidence only, I think it should appear from the record itself, that the very question, the precise title, which is the subject of litigation in the new action, was involved and decided in a former action; not that it might be, but actually was. The conclusiveness of a former judgment rests on this presumption, *res judicata pro veritate accipitur*, Dig. 50, 17, 207, which all know is but a legal fiction. It ma be true, but it may not, and is so far from being universally true that the uncertainty of judgment, the *alea judiciorum*, has passed long ago into a proverb. The thousands of overruled cases in the jurisprudence of the commercial law, collected in Mr. Greenleaf's volume, it must be admitted give some countenance to the proverb.

It appears to me, therefore, it is not enough to show that the title set up in this libel, might have been decided in the replevin suit at Baltimore, but that the record itself, to be a bar, should show that it actually was.

The second ground of defence is the unseaworthiness of the ves-

sel. And this is presented under a double aspect. First, the incompetency of the master, and secondly, the unfitness of the ship itself.

There is no question but that by the covenant of the charter-party, the libellant was bound to have the brig manned by a competent master and crew. The owner covenanted not only that the brig should be tight, staunch, and strong, but that she should be every way fitted for the voyage, and this includes a sufficient equipment, and a suitable master and crew. Abbot Shipping.

The vessel began to receive her cargo on the 2d of January, and on the 6th, when a considerable part of the cargo had been taken in, Abbot informed the master that he should not complete her cargo on account of the unseaworthiness of the vessel. But from the evidence, the principal, if not the sole reason of his refusal at that time, was the difficulty he found in getting insurance on the cargo in Baltimore. The loading was suspended, the owners informed, and further negotiations were entered upon, and on the 20th this loading was re-commenced, and again suspended on the 22d, and not resumed. Now, whatever objection to the master there might have been on the 6th and 7th, that was removed on the 10th by the appointment of a new master, who is admitted to have been *omni exceptione major*. It is not, therefore, available in this suit.

We are brought, then, to the actual condition of the brig in her hull, spars, and equipment. The objection in the answer is, that she was leaky, and her timbers rotten; in the technical language of the sea, that she was neither tight, nor staunch. The evidence against her as to leakiness I think fails. All vessels leak more or less, and there is a want of reliable proof that the Vincennes leaked more than vessels ordinarily do. The preponderance of proof is, I think, that she did not.

The whole question of seaworthiness, then, comes to the actual condition of the vessel. The owner covenanted that his vessel was tight and staunch, and if this is called in question on probable

grounds it is incumbent on him to prove it. He only has the means of doing it as the ship is in his hands. In the matter of the seaworthiness of the ship, especially of the hull, her age is especially to be regarded. The Vincennes was an old vessel; she was built in 1833, but as is proved, and not questioned, of the best materials in the most thorough manner, with an extra amount of copper fastenings, and was considered as a first-class vessel for one of her tonnage. She was overhauled in 1843, and so thoroughly refitted that she was said to be rebuilt. In 1852–3 further repairs were made, but not so thorough as those of 1843, and in December, 1852, she was chartered for the voyage out of which this controversy has arisen.

The age of the vessel, together with the want of a thorough overhauling after ten years' use, and the possible incompleteness of the repairs last made, I think, impose on the owners pretty rigorously the burthen of proving her seaworthiness, especially in her hull. And it is accordingly to this point that the principal part of the large body of testimony taken in this case is directed.

I do not propose to go into a minute and critical examination of the whole of the voluminous deposition presented. They occupied four days in the reading, and a critical examination of each would draw out this opinion to an inconvenient and tiresome number of folios. I shall advert particularly only to that part of the evidence which appears to me to have the most direct and stringent bearing to the question at issue.

After the Vincennes was discharged of her cargo by the sheriff, she was taken by Mr. Cunningham, a commission merchant in Baltimore, and laden with a cargo of 150 tons of coal, and a few cords of wood on deck. She sailed for Boston on the 23d of February, and arrived there on the 13th of March, and delivered her cargo in good order. The counsel for the respondent objects to the admissibility of any evidence of voyages performed either before or after this charter, as proof of her seaworthiness at that time. I think that it is admissible so far as fair inference may be drawn

from it, as to the condition of the vessel at that time, and no farther. It is very far from being conclusive, either way. This vessel performed the identical voyage for which she was chartered, and in the condition in which she then was, in weather at least of the ordinary security of that season, with a cargo that tried her strength quite as much as that for which she was chartered would, and she performed it well. This affords some, though not conclusive, ground for believing that she was fit for the voyage. She arrived at Portland, her home port, on the 17th, and on the 22d was examined by three sworn surveyors, appointed by the Notary for that purpose. Two of the examiners were old and experienced ship-masters, who had been accustomed to examine vessels, and the third a master ship-builder, who rebuilt the vessel in 1843, and repaired her in 1852 and 1853. The depositions of all three were taken, and they all state that they examined her fully, that two planks of her ceiling were taken off, her timbers tried and found to be sound, and after as thorough an examination as they deemed necessary, they pronounced her seaworthy. This was immediately after she had performed the voyage for which she was chartered, with a cargo at least as trying to her strength as a cargo of lumber. Without recurring to the subsidiary proof of the libellant by which this is fortified, this must be considered as satisfactory evidence of her fitness for the voyage, unless it is overcome by opposing evidence.

The evidence to control this, relied upon as much as any part of the proofs by the counsel for the respondent, is the deposition of Mr. Clockner, of Baltimore. He has been employed for many years by the insurance officers in Baltimore, to examine vessels in that port, and report their condition to the underwriters, and his reports are relied on as a guide in making insurance on vessels and their cargoes. His employment in such a trust is a sufficient warrant of his good character and reliability. These examinations he makes and delivers to all the officers in weekly, printed reports. Two of these he has annexed to his deposition, one made March

26th, 1853, and one January, 1854. In both these, the Vincennes is marked A 2½. In his system of marking, he divides vessels into five classes, and in both these reports this vessel is put in the fourth class. In his deposition, he says, without qualification, that a vessel marked in the fourth class, is deemed fit to carry a load of lumber, and that one in the fifth class, the lowest insurable, is fit to carry such a cargo, if not heavily laden. The last of these reports was at the time when this controversy arose. After the report of Jan. 7th, Clockner was employed by Mr. Howell, President of one of the offices, to make a special examination of this vessel, why, he does not state, but probably it had some relation to the insurance of the cargo. On the second examination he made a private report to Howell that she was unseaworthy. The reason of the difference between his general and his private report, was, that on his second examination he found one piece of rotten timber in one of her bow parts, which had escaped his notice in his former examination; that the Vincennes was an old vessel, and that if a timber thus exposed to the air was rotten, it furnished a presumption that she had other rotten timbers, less exposed, and more liable to rot. This was his only reason for reporting her unseaworthy, and the vessel being partly loaded, a thorough examination could not be made. This rotten timber in the bow port appears in many of the respondents' depositions, and is much relied on as proof of the vessel's unseaworthiness, not as rendering her unseaworthy by itself, but as an indication that she was probably defective in other parts. To remove this suspicion, Clockner says she should have been unladen and opened, and a plank on each side of the vessel, inside and outside taken off and the timbers exposed. This was done by the surveyors in Portland, on the inside, and the timbers were found to be sound. Dyer repaired her in 1852, and found her frame sound, and again in April, 1854, he new-sheathed her, and examined her thoroughly, and found her timber in good condition.

In connection with the deposition of Clockner, ought to be mentioned that of Capt. Hubbs, of Portland. He is an examiner for

the Ocean Insurance Co. in that place, and he says that he examined the Vincennes after she was repaired by Dyer in 1852, and that he thought the repairs were insufficient to render her seaworthy. The opinion of Capt. Hubbs would carry with it more authority, but for the fact that she was marked in the books of that company, of which he was then, I think, a director, as an insurable vessel, in the grade of 2½, the same note at which she was marked by Clockner, in Baltimore. Whatever doubts or suspicions may have been suggested by this defective timber in her bow port, the soundness of which would be naturally preserved by its exposure to the air, but which was liable to be bruised by taking in timber, is, in my mind, overcome by direct proof, and I think of a satisfactory kind, that her timbers were in fact sound. No part of her frame was found defective in April, 1854, four months after this charter, when she was fully laid open and sheathed by Dyer.

There is a large amount of testimony produced on both sides, more or less confirmatory of the positions assumed by the adverse parties, which I have not thought it necessary to comment upon in detail. When examined minutely it will be found to leave the case standing about where it rests in the deposition to which I have particularly adverted. On the whole evidence, I feel bound to say, that in my opinion the Vincennes was seaworthy. This unhappy bow port which makes so considerable a figure in many of the depositions, might not unnaturally awaken the suspicions of underwriters, and occasion some difficulty in getting insurance. They are a wary and cautious people. But the owners did not covenant that the charterer could get insurance. They covenanted only that their vessel was seaworthy, and thus insurable.

The measure of damages is, I think, correctly stated by the counsel for the respondent. It is the difference between the freight received for the cargo of coal and wood, and what would have been the freight received on such a cargo of lumber as the master stipulated for in the charter-party. The wharfage or any other port charges paid by the master, is, I think, covered by demurrage.

By the agreement of the parties, the lay days for receiving the cargo were to commence two days after the brig was reported to be ready, and that then the cargo should be delivered as fast as the crew could receive and stow it, and for every day's detention by the default of the charterer, twenty dollars a day to be paid by him. The loading was begun on the 2d of January, and continued to the 6th, then it was suspended, and recommenced on the 20th for two days. The brig was then about half laden. I think that fourteen days ought to be allowed for receiving a cargo of lumber, and being prepared to sail. This time the vessel must spend to earn the freight of the lumber, and as that by the decree is allowed, these fourteen days should be deducted from the period of detention. This would carry the time to the 16th of January. The brig was redelivered to the master after the replevin suit was ended, on the 16th of February. This will leave thirty-one days demurrage, and will amount to $620.

The case will be referred to an assessor to ascertain the amount of freight actually received for the coal and wood, and also what would have been the freight of such a cargo of lumber as the charterer agreed to furnish, and the difference added to the damages, will be the damages with interest from the time of the delivery of her cargo of coal and wood at Boston.

B. F. Hallett, for libellants.

W. G. Russel, for respondent.

THE PLATINA.

In the admiralty, when the respondent intends to rely on the objection of the staleness of the claim, or any other defence that does not go to the merits, it should be propounded by formal plea, or by a distinct allegation in the answer. Otherwise, evidence will not ordinarily be received to support it.

A set-off, or compensation founded on contract, express or implied, is no defence to a libel in a cause of damage. But in a suit by a parent for the wrongful abduction of his minor son, where the damage, substantially, is loss of service, the court is not absolutely precluded from taking into consideration, in determining the amount of damage, the advances of clothing and other necessaries for the minor during the time.

July, 1858.

WARE, *Judge.*

This is a libel brought by James N. Luce, of Edgarton, the father of James W. Luce, against Andrew Hicks, in a cause of damage. He propounds and alleges in his libel, that on the thirteenth of July, 1850, Hicks, at New Bedford, being then the owner of the bark Platina, shipped James W. Luce, his son, at that time a minor of the age of nineteen years and three months only, for a whaling voyage in said bark to the Pacific Ocean, without his knowledge or consent; thus wrongfully depriving him of the labor and services of his child, and withdrawing him from his custody and control for the remaining period of his minority. He claims damages for the loss of his son's services, as well as for the violation of his paternal rights, by this wrongful abduction. The bark returned to New Bedford July 11th, 1856, after an absence of three years.

The answer admits the shipment of J. W. Luce at the time alleged in the libel, but alleges that he was shipped as a man of full age, and for full wages; and that, if he was a minor, he had been emancipated, and had been permitted to act for himself, and enjoy the proceeds of his own labor and industry; that he was settled

with at Talcahuana, a port in Chili, and there paid the full amount of his lay, and by his own consent discharged from the bark for the purpose of going on another whaling voyage.

The minority of the young man was satisfactorily proved, as it is alleged in the libel, and there was no proof of a formal nor of an informal and constructive emancipation, as by his leaving his paternal home, being allowed to dispose of his own time, and appropriate to himself the proceeds of his own industry. On the contrary, the proof is that he continued an inmate of his father's family, and worked with him on his farm for his benefit. And also it appeared that it must have been known, if not to the owner personally, at least to his agents, whose acts are imputable to him, at the time of the shipment, that he was a minor, as in the crew list he is, in the description of his person, put down as of the age of nineteen.

The minor having been shipped without the father's consent or knowledge, there can be no pretence that he carried with him an implied authority to receive his wages, and the master, who made the settlement, must be held to have done it in his own wrong. There is, therefore, no legal bar to the father's recovering, in the form of damages, of the actual value of his son's services during his minority, and his wages may be assumed as a reasonable measure of the value of those services, of which he was deprived by the act of the respondent.

The libellant also claims further damages for the violation of his paternal rights by the wrongful abduction of his child, in withdrawing him from his control, and depriving him of the comfort and satisfaction of his son's society, and the child of the benefit of the influence, counsels, and examples of a parent in forming his habits for his future life. This claim would stand on stronger ground, if the boy had been of a tender age, and thus having more need of domestic training, and of the care and watchfulness of a parent in regard to his education and morals; or, if it appeared that the father had purposed and intended his son for a different employ-

ment. But he had arrived nearly at full age. He had been one whaling voyage before, and, as far as appears, without objection on the part of the father, if not with his consent. It does not appear that the father had any objection to his son's engaging in a seafaring life. No complaint of this kind was made on the return of the vessel. He was disappointed and dissatisfied when he found that the wages had been paid, but did not complain of the voyage. There may be a legal ground of action for the violation of his paternal rights; and these, when exercised in the true spirit of a parent, I think the law ought not to allow to be wantonly invaded with impunity; but this is not a case requiring a court to mark it with exemplary damages of this kind.

But the counsel for the respondent has urged an objection that goes to the whole libel; it is that the demand is stale, and not fit to be entertained by a court of justice. If it were the intention of the respondent to rely on this defence, it should have been regularly pleaded. According to the practice of the admiralty, a defence that does not meet the merits of the case cannot avail the respondent unless he gives the adverse parties notice of such defence by a plea or a distinct allegation in the answer. But in this case enough has been shown by the testimony to overcome this defence if it had been formally propounded. The voyage terminated in July, 1853, and the libel was filed in June, 1857. The claim is therefore not barred by the statute of limitation, even if that statute applied in the admiralty, which it does not. But courts of admiralty, like those of equity, though not bound by the statute, considering it as a law of repose, have always acted in deference to the principles and reason of the statute. They will not actively lend their aid to enforce stale demands. But the objection of staleness properly applies, at least with the most stringency, when the demand has been suffered to sleep for a considerable time in silence, and the pretended debtor has been left to rest in security until, by lapse of time and inattention, he may have lost the means of making an effectual defence to an unfounded or doubtful claim. If, then, an

action is suddenly sprung upon him, he may justly call in aid the reason and equity of this statute of repose and oblivion. In the present case the creditor has not slept on his demand. From the beginning he expressed his dissatisfaction with the settlement and payment by the master. He wanted and had calculated on his son's wages to pay for some land which he had added to his farm. He continued to insist on his rights. He offered a compromise, which was rejected. A reference was agreed upon, and afterwards declined by the respondent; and he was finally driven to a libel as his only resource. Had this defence been pleaded, it must have been overruled on the evidence.

The respondent has offered in evidence certain advances made during the voyage as a set-off or compensation against the demand in this libel. Such advances are a natural and proper charge on wages. But this is not a suit for wages on a contract, actual or implied; it is in a cause of damage, and a set-off, being a right or title, founded on contract, is no defence to a libel founded on a tort.

But the damages, as to the amount, are referred to the discretion and conscience of the court, on the whole case, and all its circumstances; and I do not know that it is absolutely precluded from taking these into consideration in a case like the present, when the loss of service is the principal measure of damage. The whole lay, as it is set forth in the libel, amounted to $578.80. The period of service was three years; one year and nine months of which were during the boy's minority. This would make the father's share $337. The answer states the whole lay a little less. Upon all the circumstances of the case, if the damages are fixed at twelve dollars a month, for twenty-one months, to cover the loss of service, and the wrong done to the libellant's parental right, it does not appear to me to be an unreasonable measure.

C. G. Thomas, for the libellant.

A. S. Cushman, for the respondents.

ROBERTS *vs.* SKOLFIELD.

An action for a joint tort against two or more cannot, in the admiralty, be united with a tort against one separately, if the objection be taken.

The general maritime law was adopted by the constitution of the United States, and no State can have a separate and distinct maritime law by itself.

This law governs the crews of the vessels of the United States, wherever they go, whether in a port of the Union, or in a foreign port.

When the constitution adopts the admiralty and maritime jurisdiction, it adopts also the law by which it is governed.

The power of the United States to govern seamen, may also be derived from the commercial power. The power to regulate commerce includes that of navigation.

When a seaman engages in a commercial adventure, the laws of the United States follow him until the voyage is completed, whether in a foreign country, or the Union.

The commerce of the country is a unity, and wherever it goes it is governed and protected by the laws of the United States.

The facts in this case are sufficiently stated in the opinion of the court.

September, 1858.

WARE, *District Judge.*

This is a libel against J. L. Skolfield, master, and W. C. Fairfield, mate of the ship John W. Dimmich, jointly, in a cause of damage. The libellant shipped at Portland, Nov. 6, 1857, for a voyage to Mobile, thence to Europe, and back to the United States. After the ship arrived at Mobile, she remained there about four months, waiting for a cargo, and while lying in the bay, at the distance of several miles from the city, on the 12th of January the events happened which are the subject of this libel.

In the morning of that day, Roberts was employed in calking the forecastle, Fairfield, the mate, being near him. Roberts asked the mate for a calking mallet. The mate told him to work with a

serving mallet, which he had in his hand; and Roberts replied that he could not work so well with that as with a calking mallet. More words, it seems, must have passed between them, for as Roberts got up, the mate struck him a pretty hard blow on his arm with the mallet which he had in his own hand. The noise attracted the attention of the master, who was on the after part of the deck, and he immediately came forward, with the master of another vessel in port, who happened to be on board. They both fell on Roberts, the mate standing by. The captain knocked him down with his fist, and they both seized him by the hair or collar, as often as he attempted to rise, and threw him down again; and continued for some time striking and kicking him on his head, face and shoulders, as he lay or attempted to rise. The boy Lewis, who was at work near, and saw the whole affair, says that they booted him all around the forecastle. Smith, also, the boatswain, who was near and saw most of the affray, says that as often as Roberts attempted to get up, they seized him by the hair and pulled him down, and repeated their blows with their hands and feet. The boatswain also confirms the testimony of Lewis, that when they had done beating him, the captain, as he went aft, told the mate that if the men gave him more of their sauce, to take a handspike, and hit them on the head. This is also stated by some of the rest of the crew.

The captain soon after left the ship, and Roberts, as he continued his work, notwithstanding the beating and booting, asked the boy Lewis to bring him some oakum. The mate told Lewis not to go, and to let Roberts get it himself. Roberts went, and as he was returning with it, the mate met him, and took from his pocket a slung shot, and struck two blows with it in his face, and one on the back of his head. These blows were given with such violence that severe wounds were made on the face and back part of his head, from which blood flowed so freely as to run down on the deck, and make a considerable puddle. Lewis, who was near, thought there was nearly a quart. The description given by Smith, the boatswain, rather confirms that of the boy. Roberts wiped the blood

from the deck with his shirt, which has been exhibited in court, and identified by the witnesses. It was saturated with blood, and shows that there could not have been much exaggeration by the witnesses. The blood continued for two days to ooze from the wound made on his nose. Roberts continued for several days to complain of pain in his head, and kept his head bound up with a handkerchief.

In a separate article the libel sets forth another tort committed by the master during the same voyage, in the port of Havre, in which the mate had no part. The counsel for the respondent objects to the union in the same libel of a joint action against two, with an allegation of a separate tort committed by one of the parties, and on this ground he moves that the libel be dismissed as multifarious. The like objection is made to the third article of the libel for the second assault of the mate in Mobile, being after the captain had left the ship.

The article for the tort in Havre does, in my opinion, render the libel open to the objection of multifariousness. But it does not follow that the libel must be dismissed. That article may be struck out by an amendment, and the libellant proceed in the suit for the joint wrong of the two. For the second assault at Mobile by the mate, after what had taken place the same morning and but an hour before, my opinion is that the master cannot be exempted from the responsibility. He left orders, that if any further difficulty occurred, for the mate to put an end to it with a handspike. The mate, instead of using this instrument, took from his pocket a slung-shot. Either mode of punishment was illegal, and the mate might fairly infer that, by directing one the master authorized the other. If this assault with a slung-shot was unjustifiable, I think the master ought to be jointly responsible for it. *Elwell* v. *Martin*, 1 Ware's Rep., 45; *Pratt* v. *Thomas*, Id., 437.

But another objection is made, which goes to the whole libel, and requires a more detailed and deliberate consideration. This is, that the subject matter of the libel is not within the admiralty

jurisdiction. The assault at Mobile, it is said, was committed while the ship was lying within the body of a county, in the State of Alabama, and thus was without the jurisdiction of this court. The objection, put into a more general formula, is that the admiralty has no jurisdiction over a tort committed by one of the ship's company against another on board the ship in matters relating to the police of the ship, and in the maintenance of discipline while the ship is lying in a port of the United States, within the body of a county. As a matter of fact it may be doubted whether the ship was within the limits of a county. But waiving this, and taking the objection in its most general form, it involves a question of great importance to the commerce of the country.

The jurisdiction of the admiralty, in matters of tort, depends on the locality of the act, and the question, which this case raises is, whether the navigable waters in the ports and harbors of the United States are within the admiralty and maritime jurisdiction granted by the Constitution. It may be admitted that the common-law courts of England would prohibit the high court of admiralty from taking cognizance of such a case. But the admiralty jurisdiction of this court is derived from our own constitution; and it appears to me to have been too long settled to be now brought into doubt; that it is more extensive than that allowed by the Court of King's Bench to the high court of admiralty in England, both in matters of contract and tort, where it is determined by the locality of the act. The judiciary act passed by the first congress that sat under the constitution, assigned to the admiralty jurisdiction over all cases of seizures made under laws of impost and navigation on waters navigable from the sea by vessels of ten or more tons burthen, as well as upon the high seas, without regard to county lines. For it can hardly be necessary to remark, that such waters in harbors, creeks, and rivers, are by the common law included within the bodies of counties. In the case of *The Vengeance*, 3 Dallas, 297, and in that of the *Betsey and Charlotte*, 4 Cranch, 443, the constitutionality of this act was brought into

controversy. The whole subject was exhausted by the elaborate argument of the claimant's counsel in the latter case, and the court unanimously reaffirmed their former decision, and have since steadily adhered to it.

We have thus the decision of all the departments of the government, the legislative, executive, and judicial, that the admiralty jurisdiction does extend to waters navigable from the sea by vessels of ten or more tons burthen, and is not excluded by the fact that those waters are within the body of a county. It may be said that the case of the Vengeance, and those which followed it, apply only to revenue seizures. But if revenue seizures within these waters are rightfully put on the admiralty side of the court, no good reason is perceived why torts committed on board American vessels in the same waters, are not subject to the cognizance of the same courts. Indeed, this has been so often decided in cases of collision, taking place in harbors and rivers, that it would seem at this day quite too late to call it in question. It does not seem to be necessary on this point to do more than to refer to the single case of the steamer Magnolia, 20 How. 296, decided at the last term of the Supreme Court. That was a collision that took place in the river Alabama, about two hundred miles above tide water; and yet it was held by all the judges except two, that it was clearly within the admiralty jurisdiction.

In such navigable waters, included within the limits of a county, the admiralty has a concurrent jurisdiction with the common-law courts, and one or the other may take cognizance of a case according to the subject-matter, whether it is of a terrene or maritime nature, and perhaps, also, according to the occupations of the parties, whether their engagements and employments are on the land or the sea. It is by these distinctions that it is to be determined what law applies and governs the case; whether that of the land or sea. If the cases are governed by the maritime, the admiralty is the proper court to administer that law, and takes the jurisdiction. If the rights of the parties are to be determined by the local

law of the place, then the jurisdiction properly belongs to those courts. In the case of the Magnolia's collision, by what court is it to be determined which vessel was in fault? They met in a common highway, where each had equal rights subject to the law. That directed how they should pass each other, whether to the right or the left, and what other measures each was bound to take to avoid a collision. Was this the law of navigation, the maritime law, the same that was their guide at sea, or was it the highway laws of Alabama? When the question is stated in this way it seems to answer itself. It is the law of navigation, the maritime law that governs the case; and this is the law of the United States and not of any particular State. When the constitution declared that the judicial power of the United States should extend to all cases of admiralty and maritime jurisdiction, this grant of judicial power carried with it *ex necessitate rei* the law by which the jurisdiction should be regulated and governed, and thus the maritime law became exclusively the law of the United States. No one, I presume, will pretend that the State of New York has a maritime law differing from that of any other State in the Union, or that any State has the power to alter that law, at least to affect the rights of a citizen of any other State, or to have any force in the courts of the United States. If ever a doubt could have existed on this subject, it is answered by the case of the steamboat New York, 18 How. 323. In that case the steamer came in collision with a brig lying at anchor in the harbor, and the owners of the brig libelled her for the damage. One of the points of defence was, that the brig did not have her light suspended at the height of twenty feet from the deck, as required by the law of that State. The court said that, however such a regulation might govern the courts of that State, and be applied to vessels engaged wholly in the interior trade of the State, it was not binding on the courts of the United States, which are governed by the general maritime law, nor would it be applied to vessels engaged in the general commerce of the country, and not exclusively in the interior trade of that State.

And the brig having such a light as satisfied the maritime law, the objection was overruled. The principle on which the decision is founded, is, that the maritime law is part and parcel of the laws of the United States, and is the same for the citizens and the ships and vessels of all the States, and not subject to be changed by the local legislation of any particular State.

The doctrine of this decision applies to the case now before the court. This is a libel by a seaman against two of the officers of the ship for an assault in the bay of Mobile, while the ship was lying, as is alleged, within the body of a county. By what law are the rights of the parties to be determined? By the maritime law of the United States, or the local law of Alabama? Under one law the officers have authority to maintain discipline, to enforce a respectful behavior on the part of the crew, and to compel obedience to their orders by moderate and reasonable personal chastisement. Under the common law, which is the law of Alabama, the hirer or employer has no right to compel a hired servant to perform his contract, by blows. Every blow given as punishment would involve the right of action. Suppose an assault to be committed in the harbor of Canton on board of an American vessel, is the case to be tried by the laws of the United States or those of China? These cases admit of but one answer. They are to be decided by the laws of the United States. These laws extend the judicial power to all cases that arise under them, and the jurisdiction must belong to their courts. Whether they be of admiralty or common-law jurisdiction, must depend on the particular circumstances of each case.

While the vessel is on the high seas, and until she arrives in port and within the body of a county, the authority of the master in maintaining the police of the vessel, and in enforcing obedience to his orders, is derived from the maritime law. As soon as she passes the line of a county, does that law cease, and the local law take its place? and does the local law furnish the measure of his authority? If the seaman deserts, under the maritime law the

master may retake and compel him by force to perform his engagements. Can the employer of a hired servant, under the common law, compel him to execute his contract by stripes and imprisonment? It appears to me that there can be but one conclusion. Either the maritime law governs during the whole engagement, or the law changes in every new port the vessel enters during the voyage. The maritime law follows the ship wherever she goes in the prosecution of her enterprise. It throws over the crew its shield for their protection, and it upholds the officers in the exercise of all their reasonable and just authority. This law, by the force of the grant of admiralty and maritime jurisdiction, is, in my opinion, the law of the United States, may be enforced by their courts, and is not subject to alteration by the several States.

But there is, in my opinion, another element which belongs to this subject, and it is that indicated in the opinion of Judge McLean, in the case of the Magnolia: 'The admiralty and maritime jurisdiction is essentially a commercial power.' 20 How. 304. By means of this, and this only, the ship's crew is under a uniform law during the whole period of their engagement, and their duties and responsibilities do not change with every new port they enter. A seaman, by entering a foreign jurisdiction, may render himself amenable to foreign laws, but his duty towards the ship, and the authority of the officers over him, are measured by the laws of the country to which the ship belongs. The constitution grants to Congress the power 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' Art. 2, § 2. Under this grant the commerce of the country becomes a unity. It is not the commerce of the separate and individual States of Massachusetts and New York, but the commerce of the United States. *Gibbons* v. *Ogden*, 9 Wheat. 194. In the execution of this power, Congress has proceeded to make laws for the government and regulation of ships and vessels, the instruments by which this commerce is mainly carried on; to provide the documents by which their nationality shall be verified, and which shall entitle

them to the privileges of American vessels. They become ships and vessels of the United States, and amenable to and under the protection of our laws; and what has a more direct bearing on the present case, Congress has enacted laws regulating the contract between ship owners and the men by whom the ships are navigated; their mutual duties and obligations, and providing penalties for the breach of these regulations; establishing, also, rules of police, defining and limiting the powers and authority of officers, and the rights and obligations of seamen. So far as these regulations have been established by acts, they govern. The authority of Congress to enact such laws has never been called in question, and moreover the constitution itself has adopted the general maritime law, as it was received and practiced in the country at the time when it was formed, having the same relation to the maritime laws of Congress as the common law has to the statute law of the country, where the acts of Congress are silent. These laws follow the ship wherever she goes, and do not become inoperative, or a dead letter, in the whole or in any part of them, when the ship arrives in and is lying within the body of a county. The laws of revenue, of navigation, and of trade, remain in full force and vigor over the ship wherever she floats; nor can I see any reason in law or public policy, why the laws which regulate the internal police of the ship, do not also. If any of the ship's company violate the local laws while lying in a harbor, they may be held amenable to those laws. But for all their acts on board the ship, which have relation to their rights or duties as members of the ship's company, they are responsible to the laws of the United States, and these rights and duties are to be measured by these laws, and not by the local laws of the port, although the vessel may be lying in waters within the body of a county. The laws which regulate the police of a ship are no more struck with a paralysis in passing a county line, than those of revenue and navigation.

I have examined this question of jurisdiction more at length than would seem to be necessary, because I have not met with any re-

ported case where the precise question involved in this has been formally decided; and also, because it was stated at the argument that this question had been decided by the District Court of Alabama against the jurisdiction, in a case arising in the same place as this. I have not seen the reasoning by which this decision, if any such has been made, has been vindicated. My own examination has led me to a different conclusion.

On the whole, my opinion is that the courts of the United States have jurisdiction over a tort committed by one of the ship's company on another on board of a ship or vessel of the United States while lying in a harbor, although she may be within the body of a county. I am unable to distinguish this case from others, of collision taking place just as this did, in a harbor, nor do I think it makes any difference whether the harbor be a foreign one or one within this country. The laws of the United States follow the ship while she is engaged in commerce wherever she goes.

That the constitution having adopted the general maritime law of the country, as it existed and was received at the time when it was formed, as the maritime law of the United States, their courts have jurisdiction of such a case as one 'arising under the constitution and laws of the United States.' Whether it be of admiralty or common-law jurisdiction depends on the facts of each particular case. Under the grant of power to regulate commerce, Congress has the power to regulate the internal police of vessels by which that commerce is carried on, and if the laws of marine are violated within the waters of a foreign or domestic port, the case is one of admiralty and maritime jurisdiction.

The right of the master to enforce obedience to his orders, and to correct the insolent and mutinous conduct of seamen by blows, is not denied. It is an authority that grows out of the necessities of the service. But it is also limited by those necessities. The rightful authority of the master must be upheld, and if a seaman is habitually disrespectful, insolent, and mutinous in his conduct, the execution of this authority will be looked upon with indulgence.

But this high power is not to be lightly resorted to on trifling occasions; never are severe blows to be given, unless necessary to enforce prompt obedience in a case of urgency, and to maintain the subordination of the crew. Never are blows to be given with a deadly or dangerous weapon, but in the most extreme cases. In any other, but in cases of the last urgency, it is an indictable offence, and punishable by fine and imprisonment. Act of Congress, United States Laws, vol. 4, p. 776. Nor ought masters to inflict a degrading or humiliating punishment, that would wound the feelings of self-respect of a seaman. The humiliating punishment of seizing up a seaman to the rigging and administering what, in the language of the sea, is technically called a flogging, is specially prohibited by law. U. S. Laws, vol. 9, p. 515.

Both these rules were violated in the present case. The knock-a man down with the fist and then kicking him around the deck on the head and shoulders, is a degrading punishment, involving both cruelty and contempt. It is evidently so considered and felt by the seamen, from the name given to this kind of punishment—'booting.' The wounds given to a man's feeling of self-respect, whether a landsman or a seaman, are those that strike deepest into the heart, and rankle with most bitterness, and are, of all, most likely to breed an insubordinate and mutinous disposition, and that will wait for and watch the opportunity of revenge. The second assault by the mate with a slung-shot, was still more exceptionable. This is certainly a dangerous, and may be, in the hands of a strong man, a deadly weapon. Such a weapon is absolutely prohibited in all cases, except of most extreme necessity, that admit of no delay, as a check to mutiny. The blows, also, were given with great force, as is certain from the wounds inflicted, the quantity of blood that came from them, and the scars that yet remain. And what was the provocation that called down this disgraceful and cruel punishment? If any, it was of the slightest character that can well be imagined. Possibly Roberts answered the mate with a little less courteousness than the conventional rules of behavior on

shipboard demanded. And all this is left without mitigation or explanation. From all the evidence, the crew appear to have been uniformly quiet, peaceable, and without any tendency to disorder. Some trouble had existed while the ship lay in the bay waiting for a cargo, on account of the provisions. But this arose from the fault of the master, and from no fault of the crew. They laid their complaints respectfully before the captain, and when they failed to obtain such relief as they had reasonable claims for, they submitted without the smallest appearance of disorder or violence to the discipline of the ship.

I award two hundred dollars jointly against the master and mate, with costs.

Gen. Fessenden & D. W. Fessenden, for libellants.

Shepley & Dana, for respondents.

THE JOHN L. DIMMICK.

To entitle seamen to double wages, under the act of Congress, July, 1790, ch. 29th, sect. 9, on account of being put on short allowance of provisions, both the conditions mentioned in the act must concur, the vessel must have left her last port with a less amount of provisions than is required by the act, and the crew must have actually been put on short allowance during the voyage.

The statute is in its nature a penal law, and is not to be enlarged by construction beyond the natural and obvious meaning of its terms.

To bring a case within the statute, the short allowance must be during the passage of the vessel, and before she arrived at her port of destination.

When the crew is put on short allowance without necessity, in a case not within the act of Congress, there is a wrong in breach of contract, and a remedy will be given by a court of admiralty, in the form of additional wages.

It is a well-understood term of contract, that the crew, during the period of their service, shall be furnished with provisions by the owners, sufficient in amount and of a suitable quality; and to refuse such a supply, without necessity, is as much a breach of the contract as to refuse payment of their wages, though this obligation is not expressed in the written or printed contract.

When the ship was lying in the bay of Mobile four months, waiting for cargo, and the usual supply of provisions from the ship's store were withheld, the crew being required to furnish themselves, by taking oysters from the oyster-beds, when the state of the weather permitted it to be done, and the supply being insufficient in quantity, they were held to be entitled to additional wages.

The daily allowance to seamen, in the merchant service, ought to be equivalent to the navy ration.

The general rule of the maritime law is that the ship is liable, in specie, for all the obligations of the master, whether arising *ex contractu* or *ex delicto*, resulting from acts done in the exercise and within the proper scope of his authority as master.

September, 1858.

The opinion of the court was delivered by

WARE, *District Judge.*

This is a libel *in rem.*, claiming extra wages, on the ground of an alleged short allowance of provisions. The libellant shipped on board of the John L. Dimmick, on the sixth of November, 1857, for a voyage from Portland to Mobile, thence to one or more ports

in Europe, and thence back to her port of discharge in the United States, for wages at the rate of $18 per month. The ship arrived at Mobile on the 28th of November, and lay there, before proceeding to Havre, till the 7th of May, 1858, about six months. The first week after her arrival, the crew were employed in discharging her outward cargo, and in other work on the vessel; and up to this time we have no complaint of the provisions. After these services were performed, the ship remained lying at anchor in the bay, about fifteen or twenty miles from the city, waiting for freight, until the last days of March, or the first of April, a period of about four months. They were then informed that they would not further have served to them their usual allowance of food from the ship's stores, but they were to live on oysters; and these were to be procured, as it subsequently appeared, by themselves. It seems that these shell-fish are found in great abundance in that bay, and of a superior quality, and are taken with great facility. It is stated by some of the witnesses, that it is not unusual for vessels lying there to be supplied with oysters, in part, at least, instead of ordinary ship fare. From this time, for about four months, and till they began to take in cargo, according to all the libellant's witnesses, their principal food was oysters, with the usual allowance of bread, and a small quantity of flour and potatoes and turnips to cook with them. The crew went themselves, in the ship's boats, to the oyster banks to procure them, and brought them on board to the amount of sixteen or twenty barrels at a time. From this time to about the first of April, when they began to take in cargo, oysters were the staple article of their food, and nearly, if not entirely, the only article of animal food, except when the state of the weather prevented them from obtaining a supply. Then they had the usual ship fare of salted meat served out to them; once, and only once, during the four months, their table was spread with fresh meat. This was at Christmas. For at least two-thirds of the time, if not more, their food, for morning, noon, and night, was oysters, boiled with a little flour and potatoes or turnips. Three

or four times during the four months they had beans, and about as many rice. Twice a week they had two small cakes baked for them, of soft bread, a specimen of which was brought into court, and one of them allowed for breakfast and one for dinner, instead of the allowance of ship bread. Most men, unless of a very quiescent temper, would have been dissatisfied with the sameness of this diet; but these men complained most of the insufficient quantity. They had not enough to satisfy the cravings of nature, and some of the witnesses say that not unfrequently they left the table as hungry as they went to it. When, for want of oysters, salt meat was allowed, it was, according to the testimony of the cook and the men, given with a sparing hand, not much exceeding half a pound a day. Twice the men went aft in a body, to complain to the captain. The first time they did not see him, though he was in the cabin. The second time they carried with them their breakfast of oysters, and asked him if he thought it enough. He said no; but if they did not open more, he would have them called at four o'clock, instead of from five to six, the usual hour of rising.

What constitutes a full or short allowance in the merchant service, is not fixed by the law. In the want of such a rule, the courts have thought that it ought to be equivalent to the navy ration. That is fixed at one pound of meat and fourteen ounces of hard bread, with one quarter of an ounce of tea, or one ounce of coffee or cocoa, and an addition of other farinaceous or vegetable food, as rice, peas or beans, or dried fruit. It is a liberal allowance for a hearty, hard-laboring man. If the witnesses of the libellant are to be believed, the allowance to this crew was far below the navy ration. The case of a short allowance is then clearly made out, unless this testimony is overcome by that offered by the claimant. Two witnesses were examined on this point, the mate and the steward. They appeared not unwilling to give a coloring to their testimony favorable to the owners. But when fairly examined, their testimony, I think, leaves the case about where it stands on

that for the libellant. The credit of his witnesses is rather confirmed than impaired, and it may be added that they gave their testimony with a degree of coolness, deliberation, and apparent freedom from prejudice and passion, unusual in such cases. It ought, also, not to be forgotten, that during the whole of this four months of short allowance, there was no insubordination; the crew were uniformly obedient and submissive, with no appearance or pretence of even disrespectful language or behavior on their part, except in a single instance towards the mate, which is the subject of another suit now pending in court.

There is one part of the mate's testimony that calls for attention, as it serves, if true, to explain and extenuate any complaint of this exclusive diet on oysters. He says that before the crew were put on this diet they were consulted by him, the whole crew being present, and that they unanimously expressed a preference to have oysters rather than fresh meat. In this I think the mate must be mistaken, as all the other witnesses say, including the steward, that they never heard anything of the kind until they heard it from the mate in the court-room.

Upon these facts, the claimant has brought a libel claiming double wages, under the act of Congress, of July, 1790, chap. 29, sec. 9, for the period of four months, while the crew were on short allowance. That act provides that every ship or vessel of 150 tons burthen, or more, bound on a voyage across the Atlantic, shall, on leaving her last port, have on board, under deck, 60 gallons of water, 100 pounds of salted flesh meat, and 100 pounds of ship bread, for each and every person on board, besides such other stores as may be put on board by the master or any passengers, and in a like proportion for a longer or shorter voyage, and in default of this supply, if the crew are put on short allowance during the voyage, the seamen shall be paid double wages for the period of such short allowance.

This act appears to me to bear on its face the character of a penal statute. It does not change the nature of the case that the

penalty is given to the seamen. It is, therefore, like other penal laws, to receive a strict construction. The two facts of a deficient supply and an actual short allowance are connected in the act by a copulative and not disjunctive word. Both must, therefore, concur to constitute the *quasi* misdemeanor, which is visited with the penalty. The Barque Childe Harold, Olcott R., 278; the Mary, 1 Ware, 459. The first inquiry then, is, was there a deficient supply on board when the ship sailed? The last port from which she sailed, before the short allowance, was Portland, and her port of destination, Mobile. Now, I think it is satisfactorily shown that the ship on sailing had as large a supply of provisions as the law requires for such a voyage. One of the facts, therefore, does not exist, which is necessary to make up the delinquency. It is true, as argued by the libellants' counsel, that if the provision is withheld from the crew, it is to them, for whose benefit the law was made, the same grievance as if the provisions were not there. Still, in the construction of a penal statute, where the law makes two acts necessary to complete the fault, it is a bold step for a court to say that it shall be completed by one.

But, if this were done, there is another difficulty behind, which appears to me to be not easily overcome. The short allowance, to bring the case within the statute, must be during the voyage. Now, when was the voyage ended? Within the meaning of this act of Congress, it was, I think, on her arrival at Mobile. A voyage, in the most common and familiar acceptation of the word, is the transit from one place or port to another, and I think that the meaning intended by the law-makers of this law. The object of the Legislature in requiring a given amount of provisions, proportionate to the ordinary duration of the passage, was to prevent that terrible calamity, a famine at sea. This is, at least, one of the most common meanings of the word, and is, I think, its meaning in this statute. The short allowance did not commence until one week after the arrival at Mobile, and not until the discharge of her outward cargo. My opinion, therefore, is, that this libel cannot be main-

tained for the statute penalty. But does it follow that the seaman is without remedy for a great wrong? I think not.

This statute penalty does not, and was not intended to, affect the mutual rights and obligations of the parties resulting from the nature of the contract. What are these within its fair meaning? The seaman engages to render faithfully all the services that pertain to the navigation of the ship, and all those that are naturally or by custom incident to that duty, as the making some slight reparations of the ship in calking or painting the deck or other part of the vessel, which is occasionally required, and, also, in the loading and unloading the cargo, according to the custom of the trade in which she is engaged. But it has never, to my knowledge, been considered an incident to their general duty as mariners to occupy their time, while lying in port, in procuring provisions for the ship's use, either by fishing or otherwise. On the other hand the seamen stipulate for and the owners promise to pay the agreed wages. This stipulation and promise is embodied in the written contract. But there is always implied another stipulation and promise, though not put in writing, that provisions for the board of the crew shall be furnished by the master and owners, and that these shall be served out to them in sufficient amount and of suitable quality. This proviso is just as binding on the owners as the written promise to pay their wages. To withhold from them an adequate supply, or to furnish food that is unwholesome, or of an unsuitable quality, is just as much a fraud in the contract, as it would be to pay them their wages in clipped coin or depreciated bank bills. I am unable to see the ground on which a distinction can be made between one and the other. If it be a manifest wrong and fraud on the contract, it would be a reproach to the law not to furnish a remedy. What difficulties might present themselves in the refined and subtle technicalities of the common law it is unnecessary here to inquire. The wrong is not beyond the remedies of a court, professing, like the admiralty, to decide *ex æquo et bono*, on enlarged principles of natural equity and the universal justice.

The seamen's contract so obviously includes board that it may be deemed unnecessary to refer to authorities in support of this. But the old sea laws were curiously directory on this as well as on other subjects. The Conselato del Marc, chap. 145, obliges the master to give the seamen meat three times a week, that is Sunday, Tuesday, and Thursday, and wine every morning and afternoon, and to double their rations on festival days. And if during the voyage he is in want of provisions or other necessaries, and if he is without money, the ship is bound; chap. 239. And it seems that they were purchased on the credit of the ship solely, for if that was lost the creditor lost his debt.

But this is a libel *in rem* against the vessel, and it is argued that even admitting there is a wrong for which the seamen are entitled to a remedy, that it is one for which neither the owners nor the ship are liable; that when the owners have put on board the vessel provisions to the amount and of the quality required, if the master unnecessarily puts the men on short allowance, this is his own personal delinquency, for which he alone is responsible. The general rule is that the owners are responsible for the acts of the master done in his character of master, and within the scope of his authority as such. *Omnia facta magistri debet prestare qui eum præposuit;* Dig. 14, I, 1, § 5; *ejus rei nomine cujus ibi præpositus fuerit*, Dig. 14, I, § 7. This is the language of the Roman law, and the word *facta*, acts, include both the contract and faults or torts of the master committed in the transaction and management of the business within the legitimate range of his authority. For though faults, like crimes, are in their nature personal, and imputable only to the delinquent individual, yet, says the jurisconsult, the exercitor of a ship and the institor of a shop or store is considered as in some measure culpable for employing an unsuitable man for his business. *Aliquatenus culpae reus est, quod opera malorum hominum uteretur, ideo quasi ex maleficio teneri videtur*, Dig. 44, VII. 5, § 6; Instit. IV. 5, § 3. The law of France precisely agrees with the Roman law. The 216 article of the Code de Commerce provides that the

owners are civilly responsible for the acts of the captain in what relates to the ship or the voyage. *Tout proprietaire est civilement responsible des faits du capitaine pour ce qui est relatif au navire et a l'expedition.* And the commentators explain the word *faits*—acts—as a generic term, which includes *des fautes et des engagemens*, faults and contracts. Emerigon Contrats á la Grosse, chap. 4, sec. 2, by Boulay Paty. And this is in perfect conformity with the ancient and well-established maritime law of Europe. The Consolato del Mare, chap. 77, provides that the captain shall be liable for any damage done to merchandise by bad storage, and adds, that 'in all damages mentioned above, and in all those which shall be mentioned in the chapters of the sea, which the ship ought to pay, the captain is bound for his part, and each part owner for his part. The ship is liable, but has its remedy over against the person who is guilty of the fault.'

The law of this country, as to the liability of owners for the acts of the master, as I understand it, is the same as the general maritime law of the world. And it stands on the general principles of the law of agency. The principal is always responsible to third persons for the acts of his agent, for his faults, his acts of misfaisance or nonfaisance, committed in the transactions of the business confided to him, as well as for his own contracts. Story on Agency, sec. 452.

It is, without question, entirely within the scope of the master's authority to direct and regulate the allowance of provisions for the crew. In doing this, he acts strictly within the limits of his powers. If he puts the crew on short allowance during the voyage, and the vessel was not, when she sailed, provided with the required amount of provisions, the act of Congress determines the nature and the extent of the indemnity to the crew. They shall be allowed and paid double wages, and the penalty may be recovered with the stipulated wages. The seamen have the same remedies for both against the masters, owners, and the ship. If he puts them on short allowance in a case that does not fall within the

statute, as when the vessel has been supplied with the amount of provisions required, or when the vessel is not at sea on the voyage, but lying in port, or if he provides for them food of an unwholesome or unsuitable quality, and that without necessity, it seems to me to be not only an injury to the crew in the nature of a tort or nonfeasance, as it appears to have struck Judge Betts in the case of the Barque Childe Harold, Olcott R., 278, but, also, a plain breach of the well-understood terms of the contract by the authorized agent of the owners, for which they are answerable on the ordinary principle of the law of agency. And as this was an economy practiced by the captain for the benefit of the ship and owners, and at the expense of the crew, it is most equitable that the ship's owners should pay for it. The crew had not only cause to complain of the insufficiency of their allowance, but for being restricted almost exclusively to a single article of animal food, and for part of the time, one or two weeks after the oysters had, from the heat of the weather, become unwholesome, and absolutely unfit for food at all.

I allow, under the circumstances of the case, to the libellant, two months additional wages, one-half the time the crew were on short allowance.

Decree $36 damages and costs.

Gen. Fessenden and *D. W. Fessenden*, for libellant.

Shepley & Dana, for respondents.

THE UNITED STATES *vs.* TWENTY-SIX BALES OF RUBBER BOOTS.

An information against 26 cases of rubber boots as liable to forfeiture under the 66th section of the act of March 2, 1799, ch. 128, for the production of an invoice by the importer at the entry not according to the actual cost but below it, with the design to evade the duties.

Plea, that the importer was the manufacturer of the goods, adjudged good.

The 36th section of the act requires the importer in all cases to enter his goods at the actual cost, and verify his entry by oath, and to produce at the entry the original invoice and bill of lading; and by the 66th section, if the invoice thus produced is made not according to the actual cost, with a design to evade the duties or a part of them, the goods or their value shall be forfeited.

The act of 1823 excepts from the act of 1799, the case of an importer who is the manufacturer of the goods, or who has obtained them otherwise than by purchase and requires of him an invoice stating the true market value.

The case at bar distinguished from *Wood* v. *the United States*, 16 Peters, and the cases which have followed it.

November, 1858.

WARE, *Judge.*

This is an information against 26 cases of rubber boots, which were entered at the custom-house at Rouse's Point, in the Northern District of New York, January 29, 1857, and thence transported to Boston, and on the 12th of February seized by the Collector of the District of Boston and Charlestown, as forfeited to the United States. The alleged cause of forfeiture is that the entry was made on an invoice produced at the entry in which the goods were invoiced as is alleged not according to the actual cost at the place of importation, but at a less price, with the design to evade the duties or some part of the same in fraud of the United States, and in violation of the 66th section of the act of Congress of March 2, 1799. To this information the claimants, protesting that the allegations in the information were not true, have put in a plea in

bar that they were the manufacturers of the goods, and imported them as such. To this plea the United States have demurred.

The question which arises on the pleadings, and has been argued at the bar, is whether the 66th section of the act of 1799, so far as it is applicable to this case, is in force, or has been repealed by subsequent legislation.

The 36th section of the act directs that the owner, on the entry of his goods, shall state their prime cost, including certain charges, which are enumerated, and also shall produce the original invoice of the goods in the same state as when received, and then goes on to prescribe the form of the oath to be administered on the entry. This affirms among other things, that the entry contains a just and true account of the cost, and that the invoice and bill of lading produced are genuine and true, and the only invoice and bill of lading received. In the 66th section it is then enacted:—'That if any goods, wares, or merchandise, of which entry shall have been made in the office of a Collector, shall not be invoiced according to the actual cost thereof, at the place of importation, with the design to evade the duties thereupon or any part thereof, all such goods, wares, and merchandise, or the value thereof, to be recovered of the person making the entry, shall be forfeited.' 1 U. S. Statutes, 677.

Thus the law appears to have remained until 1818. The act of April 20, 1818, supplementary to the act of 1799, U. S. St., vol. 4, p. 433, ch. 79, like the former act, requires the production of the original invoice on the entry, and the 5th section provides, in addition to the oath then required of the owner by law, that he should declare on oath that the invoice produced of goods subject to an *ad valorem* duty exhibits the true value of such goods at the place of exportation. And by the 8th section it is provided that when the importer is not a resident in the United States, the invoice shall be verified by the owner's oath before a consul of the United States, and he shall further declare, on oath, whether he is the manufacturer, and if so, that the goods are charged in the in-

voice at their current value at the place of manufacture. This act was by the act of April 18, 1820, 3 U. S. Stat. p. 505, continued in force till 1823.

The act of March 1, 1823, sect. 1, 3 U. S. Stat. 729, in like manner with the preceding statutes, requires, on the entry, the production of the invoice, and the 4th section gives the forms of three oaths, one of which, according to the nature of the case, is to be administered to the owner, importer, or consignee, 'in lieu of the oath now prescribed by law in such case.' The third is the one applicable to this case, and is called the manufacturer's oath, to be administered in cases where the goods have not been actually purchased. In this, the owner is required to swear that the goods 'were not actually bought by him or his agent, in the ordinary mode of bargain and sale, but that nevertheless the invoice produced, contains a just and faithful valuation of the same at their fair market value, including charges,' etc. The 5th section directs that the *ad valorem* rates of duty shall be estimated on the actual cost if obtained by purchase, and the actual value if obtained otherwise, as in this case, and not on the cost as directed in all cases by the act of 1799. One of these oaths is to be administered in lieu, that is as a substitute, for the oath then required by law. That, as it appears, was the oath required by the 36th section of the act of 1799, as modified by the act of 1818; and it is a violation of the act of 1799, in relation to the entry of the goods, that is charged in the information as the cause of forfeiture in this case.

The act of 1823, appears to be still in force, so far as relates to the entry of goods, and the oaths to be administered on the entry. At least no act repealing this part of the law was referred to in the argument, and I have found none. The oaths required by that act are declared to be a substitute for the oath then required, which was that prescribed by the act of 1799, as modified by the act of 1818. The character of the invoice to be produced and sworn to is different from that required by the act of 1799. That was the actual cost, and for this is substituted the fair market value when

not obtained by purchase; and these it is plain may be different. By the act of 1799, the duties were to be assessed on the actual cost,—by that of 1823, on the actual value in cases like that now under consideration. The latter act then necessarily repeals the former. It expressly repeals it as to the oath, and by unavoidable implication as to the invoice, when the importer is the manufacturer, by requiring a different invoice. It cannot be pretended that two invoices must be produced and sworn to, one of which must necessarily be false. The acts of 1830 (4 U. S. Stat. p. 409), of 1832 (4 U. S. Stat. p. 423), of 1842 (5 U. S. Stat. p. 563), and of 1846 (9 U. S. Stat. p. 43), do not, as far as I can find, reinstate the oath, and the regulation respecting the invoice, of the act of 1799, in cases like the present, when the manufacturer is the importer. If repealed by the acts of 1823, they remain repealed, and there can be no forfeiture for the violation of a repealed and extinct law.

This is the conclusion to which I should have come free from difficulty, if the case was not embarrassed by former judicial decisions, which are binding on this court. But in the case of *Wood* v. *the United States*, 16 Peters, 356, 14 Curtis' Decisions, 336, it was decided that the 66th section of the act of 1799 was in full force. That was a seizure of 22 packages of piece goods, imported into New York in the years 1839 and 1840. The information contained a large number of counts, but the one relied on, and on which the goods were condemned, was founded on this section of the law of 1799; and the forfeiture was claimed on the ground of making use of a fraudulent invoice, not according to the actual cost in making the entry. That decision was followed by the case of *Taylor* v. *the United States*, 3 How. 200, 15 Curtis' Decisions, 382, the case of *Clifton* v. *the United States*, 4 How. 242, 16 Curtis' Decisions, 39, and *the United States* v. 67 *packages of dry goods*, 17 How. 89, and 21 Curtis, 383, in 1854. All these cases followed, and affirm the decision in *Wood* v. *the United States*, and hold that the 66th section of the act of 1799, on which this information is

founded, is still in force. If these decisions cannot be distinguished from the case at bar, then, whatever may be my private opinion, the plea in bar must be adjudged bad, and judgment rendered for the forfeiture.

In all these cases there were counts on the 66th section of this act, claiming a forfeiture for producing an invoice not according to the actual cost. But in none of them does it appear from the printed reports that the importations and entry were made by the manufacturer. By subsequent legislation, as well as by the act of 1799, imported goods, bearing an *ad valorem* duty, when obtained by purchase, were required to be invoiced according to the actual cost. And though in some of them a different penalty for the use of a false and fraudulent invoice was imposed, the court has steadily held that the penalty prescribed of a forfeiture of the goods or their value by the 66th section was not repealed but is still in force. The doctrine of the court is that prior laws for the collection of the revenue are not impliedly repealed by subsequent legislation, except so far as there is a direct repugnancy between the later and the earlier law, and then only so far as the repugnancy exists.

In none of these cases was the law brought to the attention of the court in the precise point of view now presented. And, if we refer to the reasoning of the court in the case of *Wood* v. *the United States*, which is referred to and approved in the subsequent decisions, it appears to me, that it will admit of a distinction, while holding the section of the act in question to be generally in force and unrepealed, that will take this case out of it. If we suppose in these cases what seems to be a fact, that a fraudulent invoice below the actual cost was used in the entries by purchasers of the goods, the identical offence was committed, for which the penalty in this section of the law was intended. Though later laws have made provisions for the same offence and armed them with penalties, these may be considered as cumulative, and as this section has not been expressly repealed, the adding of a cumulative remedy in fiscal law is not held to be an implied abrogation of a preëxisting law.

It may be conceded that the government cannot claim both penalties, and they may be still at liberty to prosecute for one or the other, at their election.

The fiscal laws of the country, though bristling with forfeitures and penalties, are not held to be penal laws in the technical sense of the word, and like them to receive a strict and narrow construction. 3 How. 210. The penalties are for the prevention of fraud, and the protection of the revenue, and they operate incidentally for the benefit and protection of the honest importer and trader, against his fraudulent competitors. For the common interest as well of the government as of honest trade, they are to be allowed a fair and reasonable operation in furtherance of the intention of the legislature. But, giving this construction to our complex revenue laws, it appears to me that the act of 1823 necessarily repeals so much of the 36th and 66th sections of the act of 1799 as applies to this case. It excepts out of the general rule requiring the importer to produce an invoice stating the cost, the case where he is the manufacturer, by requiring of him to produce a different invoice. The two laws appear to have that repugnancy, that both cannot stand together, and that the latter must be held to repeal and annul the former in this particular.

The result is that the plea in bar is adjudged good.

Chas. Levi Woodbury, for United States.

Milton Andros, for claimants.

THE SAINT LAWRENCE.

By the maritime law, every person who furnishes materials or labor for the building and repair of a ship has a lien or privilege on her for his pay unless the privilege is expressly waived by the terms of the contract.

The legal right of the master to charge the vessel for repairs.

When a ship's husband had his legal domicile at Northport, in Maine, but passed two-thirds of his time, and did his business at New York, the latter was held to be the proper district for enrolling and licensing the vessel under the act of Feb. 12, 1793.

MATERIAL MEN'S LIENS.

March, 1859.

WARE, *District Judge.*

This is a libel brought by Wm. J. Currier against the schooner St. Lawrence, for supplies and repairs furnished her while lying in the port of Bangor, in this State. It is not denied that the articles charged, the principal of which was a second-hand mainsail, were furnished, that they have not been paid for, and that the price is justly due to the creditor. But it is contended that he has mistaken his remedy; that in law the vessel is not liable for the debt, but that it is merely the personal debt of the owners, and entitled to no privilege against the ship.

The schooner was owned in moieties by Wm. Bush of New York, and John Patterson of Northport, in this State. Patterson purchased his half April 8, 1858, and became ship's husband. She was enrolled by the owners, and licensed in New York, and let by them to John W. Dickey, as master, to be employed by him on shares in the coasting trade. Under this well-known contract, the profits are divided between the hirer and the owners; the hirer is at the expense of victualing and manning the vessel, certain port charges being paid in common, and the owners are to keep the ves-

sel in repair. Patterson, the ship's husband, had his legal domicile in Northport, where his family resided, but his principal business was at New York, and that was his most usual place of residence.

By the general maritime law, every person who furnishes supplies for a vessel, whether repairs for the ship or provisions for the crew, has a privileged claim, in our law, called a lien, against the vessel for the price of his supplies. It is a principle of the maritime law, as old as the law itself. He is considered as trusting the vessel itself; that is treated as his debtor, and the suit is *in rem* directly against the thing in specie, and not circuitously as in the Roman law against the person having the possession or claiming the ownership. But by the maritime law of this country, this privileged lien is held to exist only when the supplies are for a foreign ship. This was decided in the case of the Gen. Smith, 4 Wheaton. And in the same case it was decided that within the meaning of our maritime law, and for the purpose of creating this lien, a ship is to be considered as a foreign ship, when she is in a port of any one of the United States other than that to which she belongs.

This vessel was enrolled and licensed in the district of New York, and within the rule established by the case of the Gen. Smith, she is to be considered and treated as a foreign vessel in Bangor, provided she was enrolled in the proper Collection District. By the registry act of December, 1792, sect. 3, and the license act of Feb. 18, 1793, vessels are required to be registered or enrolled in the Collection District that comprehends the port to which they belong; 'which port shall be deemed to be that, at which or nearest which, the owner, if there be but one, or if more than one, the husband or managing owner of such ship or vessel usually resides.' The managing owner in this case had his legal domicile at Northport, where his family resided, and where he exercised the right of ownership. But his business was in New York, and there he resided two-thirds of the year. I think that New York was the place of his usual residence within the meaning

of our navigation laws, and that she was properly enrolled there; and that by our maritime law for the purposes of the lien here sought to be enforced the schooner in Bangor was a foreign vessel.

The lien, therefore, attached, unless it is excluded by another objection urged by the claimant's counsel. These supplies were obtained on the order of the master, and it is contended that the master has no authority to charge the vessel for repairs or supplies, whether at home or abroad, when the owner is present, or when he has a correspondent, and they can be obtained on personal credit. And in this case, it is argued, that though the part owner, Patterson, was not present in person, his home was in the neighborhood, where the fortune of his family was found, and where he had a personal credit that was equivalent, at least, to a correspondent. Such as is stated is undoubtedly the limitation of the master's authority to charge the vessel by a bottomry bond with maritime interest. I am not prepared to admit that it follows as a legal consequence, that the same limitation applies to charging the vessel with the common maritime lien bearing common interest. *Emerigon Contr. a la grosse.*

But however this may be, I do not think the question is necessarily involved in this case. The master, in his deposition, expressly says that the schooner needed a new mainsail, and it seems that both the owners thought so, also, and directed him to purchase a second-hand sail, which he accordingly did. The captain, therefore, may justly be considered as acting, not under his implied power as master, but under the express authority of the owners themselves. The contract will, therefore, have the same legal effect as though the supplies were furnished on the personal order of the owners. And in that case, the ship will be bound, unless by the terms of the contract her liability is excluded. So far from this being the case, the master, in his deposition, says the supplies were expressly furnished on the credit of the ship, and no terms of credit were given, which could be construed into an implied waiver of the lien. In that case, on the general and familiar principles of

the maritime law, a lien results as a matter of course. Every person who loans money for the building or repair of a ship has a privilege against the ship for the repayment of the money, and the privilege extends as well to the person who furnishes the repairs and materials, as to the creditor who lends money to pay for them. *Emerigon Contrat a la grosse*, ch. 12, sects. 3 and 4, and this text, as well as others of a like character, has been so often quoted as equally true in the maritime law, which, in fact, borrowed it from that of Rome, by all the writers of the highest authority, that if the doctrine is now to be brought into doubt, we may as well discard all tradition of the maritime law as a fiction or a dream. I am aware of the remark incidentally made by the judge who pronounced the opinion of the court in the case of the Sultana, 19 How. 361 (*Pratt* v. *Reed*), which seems to imply that the owner himself cannot subject the vessel to this lien, when the supplies can be obtained on personal credit. That case might be well decided on its own particular facts, and did not of necessity require the decision of this general question. And I cannot suppose that the court intended to overthrow in this incidental way, a principle of the general and public maritime law, acknowledged and acted upon by the whole commercial world from the earliest times. I feel bound to pronounce for the lien.

Barnes, for libellant.

Shepley, for respondent.

MERRILL, LIBELLANT, *vs.* AREY.

Where by the terms of a charter-party the hirers of a vessel covenanted to return her on the expiration of the service in like good condition as when she sailed, ordinary wear and the damages of the seas excepted, the risk of a loss by fire is on them.

'Dangers of the seas' include only those which accrue from the action of the elements, and such as are incident to that cause, rather than all that arise on the sea. An accidental fire is not one of the peculiar dangers of the sea.

In all contracts, both for service performed, and for dangers assumed by the way of bottomry or insurance, the maritime law gives full indemnity, but no more.

March, 1859.*

WARE, *District Judge.*

This is a libel on a charter-party. The libellants, being the owners of the schooner William Henry, of the burthen of 130 tons, on the 17th of February, 1853, let her to the respondents, by the charter-party, for two or three voyages, at the option of the hirers, from Frankfort to the Chesapeake Bay, or any other southern port or ports, for the monthly charter of $150. By the terms of the contract, the hirers were to victual, man, and sail the vessel, at their own charge, and to return her at the expiration of the service, to the owners, in the like good condition as when they took her, ordinary wearing and the dangers of the seas only excepted. She soon after took in a cargo of ice and sailed from the Penobscot on the first of March, for Pensacola.

According to the testimony of the respondents the vessel was found to leak some, but not badly, soon after getting to sea, but about ten or eleven days after sailing the leak increased, either from an injury to the vessel from striking some heavy, floating

*NOTE BY REPORTER.—This case, though appearing by the manuscript to have been decided in 1859, was determined in 1854, and the decree of the District Court was affirmed by the Circuit Court at September Term, 1854.

body in the water, or from the increased violence of the sea. In the condition in which the schooner then was, the master did not think it safe to prosecute the voyage to Pensacola, and he bore away and put into Norfolk for repairs. He then made a protest, and called a survey of the vessel. It was found that the ice had been considerably wasted by the influx of sea water, and the cargo had shifted, and the surveyors advised to unload her and sell her cargo, in order to a more full examination of her hull. This was accordingly done, and on an examination some trifling repairs were made, at an expense of something over twenty dollars.

The outward cargo for Pensacola having been sold, the voyage was abandoned. After remaining at Norfolk about ten days, the master sailed for Baltimore, with a light, southerly wind, and fair weather, passed Point Comfort about dark, and though varying his course from time to time, in order to keep in the deep water of the channel, struck on the Tangier shoals about midnight. After lying there through one tide, about a mile and a half from the shore, and attempting without success to get the vessel off, the master, with the crew, left in the boat early in the afternoon, and went ashore. They returned in the course of the afternoon and took some articles from the vessel and left her for the night, towards the close of the afternoon. The next morning the schooner was discovered to be on fire, and when the master and crew arrived in the boat, she was burned from stern to midship. Some of the sails and rigging were saved, but the hull of the vessel was entirely destroyed.

The schooner was insured for $1500, and valued in the policy at $3000. The insurance has been paid.

A large amount of testimony has been taken relative to the conduct of the master before the vessel arrived at Norfolk, to the transactions there, to the master's conduct after leaving Norfolk in going up to the Chesapeake, and his leaving the vessel after she struck on the shoal, from all which the counsel for the libellants infers, that there was gross negligence, if not criminal misconduct, on the part of the master, while the counsel for the respondent con-

tends that no fault is justly imputable to him, but that throughout the whole he acted with reasonable discretion and prudence, and that the loss of the vessel was a pure misfortune for which the hirers are no way responsible.

In the view which I have taken of the case, I have not thought it necessary to enter into a minute examination of this testimony. By the general principle of the law of hiring of things, the hirer is bound to take the same care for the preservation of the thing that a prudent man takes of his own property of a like nature, under like circumstances. Story on Bailments, § 398–400. It is a contract of mutual interest. The hirer is benefited by the use of the thing, and the lender by the hire or rent paid. The hirer is not liable, as a common carrier, for a loss by every sort of accident, except by the act of God, neither is he bound for that extreme care and diligence, that one is, who has the use of a thing by a gratuitous loan and the whole benefit of the contract is on one side, and the burthen on the other. But he is responsible not only for his own diligence, but for that of his servants, to whom the thing is entrusted. If this, therefore, had been an ordinary contract of hiring, and to be governed by the common principles of the law applying to this contract, the inquiry into the conduct of the master and crew would become very material. But the liabilities of the hirer may be varied or enlarged by the terms of the contract; and the agreement by which this vessel was hired, was special. She was hired by a charter-party, by which the hirers covenanted to return her on the expiration of the service, to the owners, in like good condition as when she sailed, ordinary wear and the dangers of the seas excepted.

Stranding on the shoals is indeed one of the dangers of the sea, but the stranding was not the proximate cause of the loss. In the actual state of the weather, it is, I think, sufficiently apparent from the evidence, that the vessel might have been got off and saved without great difficulty or expense, if she had not been burnt. It may be said that the stranding led to the burning, and was thus the

first, and in one sense the efficient cause of the loss. But even this would not have been the case if the master and crew had remained on board; and after all the explanations that have been given, I cannot perceive that the abandonment of the vessel was imperiously called for. It is said, indeed, that there were some indications of a storm, and if one had arisen the vessel must have been destroyed, and the lives of the crew put in jeopardy. But the peril should be imminent and serious that will justify a master in abandoning his vessel. Lying as they did, within a mile and a half of the land, the master might well have remained in the vessel till the danger was more pressing. Without, however, dwelling on these circumstances, the risk of a loss by fire, in my opinion, by the terms of the contract, the hirers took on themselves.

Dangers of the seas is somewhat of an equivocal expression. It may, without any violation of its natural import, be interpreted to mean, dangers that arise upon the sea, which would include every hazard and danger, from the beginning to the end of the voyage, of whatever kind; or with equal propriety, it may mean only those which arise directly and exclusively from that element, of which that is the efficient cause. Sometimes it is taken in one sense and sometimes in the other. In insurance cases, where the import of this phrase is as often considered as in any other, perhaps oftener, its meaning is not exactly settled. And there may be a difference between the force given to it in this, and other maritime contracts, such as bills of lading and charter-parties; and I am not aware, if this is the case, that it is exactly discriminated. In most cases, the owners of the ship have the possession by their own masters and mariners, for whose conduct they are more or less responsible. But in the present, the charterers had the possession. They equipped her with their own master and men, and had the entire direction of her motions. The exceptions were introduced into the charter-party in their favor. It would, therefore, be natural, and in conformity with the common rule of law, if its meaning were doubtful or ambiguous, to interpret it against them, and in favor of

the other party. I think, also, it would be most in harmony with the general inclination of American courts, to interpret this phrase as including only dangers that arise from the action of the elements and the dangers incident to that cause, rather than to include all that arise on the sea. The exception now commonly introduced into insurance policies of loss by fire, shows a doubt, at least among those most conversant with maritime affairs, whether this would come within the common phrase, dangers of the sea. An accidental fire is not certainly one of the peculiar dangers of that element. It may arise on land as well as at sea. Besides, an accidental fire always implies some degree of fault or carelessness among those whose duty it is to prevent it. On the whole, in this case, I do not think that a loss by fire ought to be included in the dangers of the seas, and more especially as the charterers had the possession. This decision is, I think, justified by the principles of law,* and is consonant to the decision of the courts.

If it be held that the charterers are liable on this contract, the question arises, for what sum they are liable, whether for the whole value of the vessel, or for such part as is not covered by the insurance. Though this question was not raised in the argument, it is not seen how it is to be avoided, and it is not of easy solution.

The schooner was insured for $1500, and this has been paid. Insurance is essentially a contract of indemnity. Where nothing is exposed to loss, it is a mere wager, and it is a well-established

* The Roman law contains salutary admonitions on this subject. Every fire in a building, if it could be traced to no other cause, was presumed to arise from the negligence or fault of the inhabitants. *Plerumque incendia culpa fiunt inhabitantium.* Dig. 1, 15, 3, § 1; Dig. 18, 6, 11. And by the Aquilian law, those from whose fault it arose, or whose duty it was to prevent its spreading and ravages, were answerable for the consequences. Dig. 9, 2, 27, § 5, 9. The French have adopted this principle from the Roman law, and carried it out with much more efficiency than has been done either by the law of England or this country. *Toullier*, vol. 11, No. 155, *et suivant*, in an examination of engagements that are formed without convention, has, with his usual learning and ability, given the history and present state of the French law on this subject, and particularly in No. 179, in vindication of the severity of the law.

principle that this is simply void, and as a consequence, the property at risk, even when valued, may be always a subject of inquiry; though if anything is at risk, the court will incline in favor of the assured. 1 Sum. 433, *Alsop* v. *The Com. Ins. Co.* In this case, the vessel was at risk, and was of greater value than was assured by the insurers, and as by the terms of the policy, a loss by fire was included, they could make no defence. But on this contract, can the owners recover the full value of the vessel. If they can, so far as the insurance goes, they recover a double indemnity. And this is against the clear policy of the maritime law. But the counsel for the libellants says they recover as trustees for the insurers. What claim have the insurers to this sum since a loss by fire was one which they expressly took on themselves? It seems to me that their mouth is closed. Their own contract, their own words, must raise an insuperable obstacle to their recovery in any form of action, or against any parties. If the owners recover in this action the full value of the ship, in every view which I can take of the case, they will be twice paid to the amount of the insurance. In all contracts, both for service performed, and for dangers assumed by the way of bottomry or insurance, the maritime law scrupulously gives what is due to full indemnity. But it gives no more. It does not permit owners to make a profit out of a common calamity. On the best consideration of the subject, which I have been able to give, I think the owners in this action can recover the whole of value of the schooner above the amount insured, and no more.

There were a number of depositions taken as to the value of the vessel. There was a wide and singular discrepancy in the testimony, varying in the estimate of her value from $1000 to $3500. In such a conflict, the court is thrown on its own opinion, to be made up from circumstances about which there is no controversy, and as this case will by appeal be carried to another tribunal, any errors I may commit may be corrected. She was of the burthen of 130 tons, and about seventeen years old, and I have come to the conclusion that she was worth about $2000. The libellants also

claim charter for her to the time when she was lost, amounting to $115. This is allowed. Some, also, of the rigging was saved. After all allowances are made, the decree will be that the libellants receive $698, and costs of suits.

Merrill, for libellants.

Shepley & Dana, for respondents

THE SUSAN.

A seaman is entitled to his wages as soon as he has completed his contract and is discharged from the vessel.

The provision in the seaman act of 1790, that process shall not issue against the vessel until ten days after the vessel has arrived at her last port of discharge, except under certain contingencies, does not suspend the right to a personal suit, either in the admiralty or at common law, until after the expiration of that time.

The admiralty has a general discretionary power over costs, and when a seaman has a just cause of complaint it will deny him costs, unless he allows to the master and owners a reasonable time for an amicable settlement of the dispute before commencing his libel.

Costs in this case allowed on the facts.

April 6, 1859.

WARE, *District Judge.*

This is a libel *in personam* by Trott, the mate of the brig Susan, against Drew, the master, for wages. The libellant shipped at Charleston, South Carolina, Feb. 4, 1859, as mate, for wages at $40 per month, for a voyage from that port to Boston. The brig arrived in Boston in the evening of the 7th of March, and Trott was discharged and left the brig on the 9th, the period of service being one month and one-seventh of a month, which, at $40 a month, amounts to $46.66, and he had received advance wages to the amount of $20.25, leaving due $26.41.

It was not much disputed at the hearing, that the evidence actually in the case, showed a balance of wages to be due. There is, in the answer, a defence set up of misconduct and incapacity, which, if proved, might go to a reduction of the rate, or an entire forfeiture of wages; and the respondent moved for time to obtain and introduce proof in support of this allegation, but that motion,

under the circumstances, was overruled, and there remains no defence against the claim for wages.

But it is objected the suit was prematurely commenced before the time of service was ended and before the libellant was discharged. The deposition of Antonio Garcia, the cook, connected with the answer, sufficiently shows that Trott was discharged, by the master, on the 8th of March. The cook was then discharged and there was no more cooking for the crew, though Trott did not finally leave the brig until the 9th. The master, in his answer, says, that on the 8th he told Trott that his services were no longer required on board, and that if he called on the owners his wages would be paid. The admissions in the answer are evidence to charge the master, though his averments are not evidence in his defence; and this, in connection with the fact that the rations of the crew were then stopped, is sufficient evidence of a discharge. Trott, indeed, according to the answer, said that he would not take his discharge until his wages were paid. But the next day when he found that no provision was made for his board, either in the vessel or on shore, he had a right to discharge himself. He may be considered as discharged, so far as the master is concerned, on the 8th, and the wages were then due and payable, and the libel was filed on the 10th. The wages of a seaman are payable of common right as soon as his contract is completely performed, and then the right of action arises. The provision of the seaman act of 1790, that process shall not issue against the vessel until ten days after her a rival at her last port of destination, and the discharge of her cargo has never, that I am aware, been construed as suspending the right of a personal action against the master or owner until after the expiration of that time, either in common law or in the admiralty. My opinion is, that there was a legal right of action when the libel was filed.

It is then contended that, if the legal objection to the suit be overcome, it was hastily and vexatiously commenced, without allowing the master and owners a reasonable time to compromise and

settle the dispute, and that, therefore, no cost ought to be allowed. That there was a dispute about the wages, is amply shown by the answer. That is framed with a view to a defence against the entire claim. The admiralty has a general discretionary power over the matter of costs, and it is its habit to exercise this power for the purpose of checking vexatious litigation. It exercises liberally a large discretionary power for the protection of seamen against undue advantages attempted to be taken by masters and owners.

But it will not allow this protecting shield to be turned into a weapon of offence.

If a controversy arises and a seaman has a just cause of complaint, it requires of him a reasonable moderation in enforcing his rights by legal process. If in a revengeful and litigious spirit, he runs with hot haste to commence a suit without allowing a reasonable time for an amicable settlement of the controversy, the court will mark its sense of his conduct by a denial of costs. But I do not think this can be fairly charged on the libellant in this case. He had been discharged from the ship, and at that time he claimed his wages; his rations were stopped and he was thrown on his own resources for the expense of board; there was evidently an ill feeling between the parties and it is equally evident that there was a controversy about the amount at last due. He waited two days before commencing a suit, living at his own expense. In cases of seamen, a delay of payment practically amounts to nearly a denial of payment. My opinion is that Trott is justly entitled to costs.

Sawyer, for libellant.

Hodges, for respondent.

THE BRIG ERIE.

A charter-party will not be construed to be a demise of the ship, although her whole capacity is let; unless the possession is transferred to the charterer.

By the maritime law, when a ship is chartered to one or more parties out and home, freight will be due to each port where cargo is delivered, though the ship is lost on her return home. By the maritime law, freight is due as far as the charterer has had the beneficial use of the vessel.

The owner and charterer as between themselves may make the whole freight, in such a voyage, to depend on the safe arrival of the ship at her home port, or on any other contingency.

But when they make the freight to depend on any farther condition than the safe delivery of the cargo, this will not affect the right of others who have an interest in the freight, as seamen for their wages, or lenders on bottomry.

They trust to the ship, and have their rights against the freight as appurtenant to the ship; and as far as she has earned freight, by the maritime law, their rights cannot be impaired by any private agreement between the owner and charterer, to which they are strangers.

When a vessel is chartered at a monthly freight on a round voyage to one or more ports, and the language of the contract leaves it doubtful whether the voyage is single or divisible, for the purpose of freight, the presumption is that it is divisible, and against the waiver by the owner of his legal rights. And this presumption holds, although the freight is made payable after the ship returns to her home port.

But if she is chartered for a gross sum for the round voyage, and that by the terms of the contract is made payable after her return to her home port, it seems that the presumption is, that the whole voyage is one and indivisible, and that no freight is due to the owner until the whole is completed.

But if not made payable on that or any other contingency than the delivery of her cargo, the presumption of the law is, that it is a divisible voyage.

This was a libel *in personam*, by the owners of the brig Erie against the charterer for the charter or hire of the vessel. The brig was chartered for a voyage from the port of Boston to Port-au-Prince and back to Boston. The charterers were to have the use of the whole vessel except what was required for the use of the crew, and for the stowage of the sails, etc., and to pay '$1800, and all port charges, pilotage, and lighterage, and to advance to the captain what money he may require to disburse the vessel at

Port-au-Prince, not to exceed one-half of the freight.' There is a further provision that 'the charterers or their agent are at liberty to re-charter this vessel, or to take freight therein, and that the master shall sign bills of lading for all lawful merchandise laden on board said vessel during the voyage aforesaid, at the rates of freight by terms contracted for, as they or their agent may require, without regard to the terms of this charter.' Under this contract, the brig sailed from Boston, Oct. 25, 1856, and arrived at Port-au-Prince Nov. 10, and safely delivered her outward cargo. The master there took up four dollars only, to disburse the vessel. She took in a full cargo and sailed December 3d, and was totally lost on the return voyage.

Parker, for libellant.

Brigham, for respondent.

The counsel for the libellant cited and relied on *Marquand* v. *Banner*, 36 Eng. L. & Eq. 139; *Mackrell* v. *Simmond*, Abbot on Shipping, 466; *Havelock* v. *Giddes*, 10 East. 550; *Brown* v. *Hunt*, 11 Mass., 45; *Lock* v. *Swan*, 13 Mass. 76.

The counsel for the respondent relied on *Byrne* v. *Paterson*, Abbot on Shipping, 566; *Barker* v. *Cheviot*, 2 John. 352; *Pennayer* v. *Hallet*, 15 John. 332; *Coffin* v. *Storer*, 5 Mass. 352; *Towle* v. *Kettell*, 5 Cush. 18; *Blanchard* v. *Bucknam*, 3 Greenl. 1; *Peste* v. *Robertson*, 1 John. 26.

1859.

WARE, *Judge*.

It is contended for the libellant that this is a contract for letting the vessel, and not a contract of affreightment; and that though the loss by an accident of major force may excuse the hirer from the return of the vessel, it will not exempt him from the payment of the stipulated hire; and the case of *Marquand* v. *Banner*, 36 Eng. Law and Eq. Rep., 139, is referred to

as directly in point. That was a charter of very complicated conditions. Like this it was for a gross sum. The vessel was to be used by the charterers as a general ship, as this might be; and the master was to sign bills of lading without reference to the charter, on such terms as the charterers might direct, as is also provided in this charter; for an action on a bill of lading, the question arose to whom the freight was due and payable,—to the ship owner or the charterer. The court held, that as the charterers were to pay a lump sum for the use of the vessel not dependent on her earnings, that the freight accrued to the charterers, and that the master in signing the bills of lading acted as their agent, and not as the agent of the owners. It is true that the judge, who pronounced the judgment of the court, at the close of his opinion, says that the charterers must be considered as the owners of the ship. But taking the whole of his reasoning together, it is evident that his meaning was only that they were owners in relation to the accruing freight, and not owners for all purposes. A charter-party, in order to amount to a demise of the ship, and clothe the charterers with all the right and liabilities of owners, must transfer the possession of the ship as well as a right to the profits of her employment. *Drinkwater* v. *the Spartan*, 1 Ware's Rep., 156–159. In this case the owner retained the possession by his own master and crew, and the general rule, to which there, perhaps, may be rare exceptions (*Trinity House* v. *Clarke*, 4 Maule & Selwin, 233), is, that although the owner lets the whole capacity of the ship, yet if he appoints the master and crew, it is not a demise of the ship, but a contract of affreightment. Taking this to be a charter of affreightment, and not a letting of the ship, the only question raised by the libel and answer, is whether on these admitted facts anything, and if so, how much, is due under this charter. This depends upon the construction of the contract, whether the voyage out and home was a single indivisible or a divisible voyage.

It is apparent on the face of the contract, that the parties anticipated only a prosperous termination of the whole enterprise; and

as such a disaster as occurred did not enter into their calculation as a probable event, it was not provided for. The court is therefore left to infer, in the best way it can, what provision would have been made, if such a disaster had been contemplated as a possibility.

There are two sources to which recourse may be had to guide our judgment in coming to a conclusion. The first is the contract itself, in all its terms and conditions. If those show to a tolerable certainty, or a reasonable probability, what their intentions may have been, if, in fact, they had any, which is, perhaps, hardly probable, then this intention ought to prevail. The second is the law which regulates and governs the subject-matter of the contract, when not affected by the special agreement of the parties. For all persons, when entering into engagements, of whatever kind, are presumed to know the law, and must be considered as making them with reference to it. The law, therefore, according to the presumed intentions of the parties, comes in as a supplement to their contracts, and measures and regulates their rights and obligations where the contract is silent.

In the first place let us look at the law. By the maritime law, when a ship is chartered for a foreign port and back, if she delivers her cargo at the outward port, the freight is earned and due. It is the price of that service which has been performed, and it is then due and payable, unless by special agreement it is made dependent on the safe arrival of the vessel at her home port, or on some other contingency. This is shown by the common form of a bill of lading. The goods are to be delivered to the consignee, he paying freight. If she is hired or chartered for several ports in succession, and proceeds on her voyage and delivers cargo at two, three, or more, and, after prosperously prosecuting her enterprise to the last outward port of delivery, is lost on her return for her home port; freight will be due, as well as wages, to the last port where she has delivered cargo, unless the law is controlled by the special terms of the contract, so that it is made to depend on some

further condition beyond the safe delivery of the goods. There may be a partial exception in charters for a purely trading voyage along the coast, called in the French law a voyage *en caravan*, in which, according to *Emerigon*, the whole is but a single voyage; and though in this, a sort of retail trade, the freight is collected from time to time, wages are not earned, and, perhaps, charter not due until the voyage is completed, *De Assurances*, Liv. 13, §§ 3, 2. This, however, is but an exception, and the general rule is, that the hirer shall pay freight or charter as far as he has had the beneficial use of the vessel, notwithstanding that by an accident of major force she has been prevented from performing the whole service for which she was engaged.

But parties for the purposes of freight, as between themselves, may consolidate all these voyages into one. The common law, which favors the unity and entirety of contracts, when there is but one agreement, though more than one thing is to be done under it, in a doubtful case may incline that way. But this is a maritime contract, and the maritime law easily renders contracts divisible when the justice and equity of a case require it. The charter of a vessel for a single foreign port and back, or to a number of successive ports and home, is not made one indivisible voyage because engaged for by one agreement, nor because it is called one in that agreement; but is divided for the purposes of freight, which in its largest and most general sense means the hire of the ship (1 Valin, p. 639, Tit. Du Fret.), and is also for wages divided into as many voyages as there are ports of delivery. The ship owner and charterer may, by special agreement, make them all one voyage as between themselves, and suspend the right to freight for the whole on the safe arrival of the ship at her home port. But the presumption is otherwise; and however clear this may be on the terms of the contract between the owner and charterer, it will not affect the right of third persons, who have an interest in the freight. Notwithstanding any such agreement, freight will be earned at each port of delivery for the benefit of the seamen and the holders of

bottomry bonds, who have an interest in the freight. They are strangers to the contract, and their rights cannot be bargained away by the owner and charterer. I have seen, says Emerigon, in a great many (*une foule*) charter-parties, a provision for the forfeiture of half the freight, in case of an infraction of the contract. But, he adds, this conventional penalty cannot affect the privilege of the seamen, nor the lenders on bottomry. The reason is, that they have given credit to the ship. She, with her appurtenances, is their debtor, and the ship, by the maritime law, has earned full freight by the delivery of her cargo. The seamen and the bottomry creditors have a privilege against this freight, and have a right to proceed against it as appurtenant to the ship, on their maritime hypothecation, before it is absorbed or diminished by any private agreement between the ship owner, and the freightor. *Contrats a la Grosse*, ch. 4, §§ 13–2. *Pitman* v. *Hooper*, 3 Sumner, 336. The case stated by Emerigon does not, indeed, directly apply to this case, for this is a controversy between the owner and the charterer; and the owner, where the rights of third persons are not involved, may make the payment of freight depend on what conditions he pleases. I refer to the opinion of this eminent jurist to show how clear it is, that by the maritime law, freight is earned for the ship at every port where cargo is delivered.

It has before been observed, that no one is ever presumed to waive his own rights. Express words are required for that purpose. Still less is he to be presumed to waive the rights and interests of other parties. If his own he may relinquish for such consideration as he pleases, he can make no bargains for others without an authority for that purpose. To attempt to waive the rights of others would be an attempted fraud, and fraud is never to be imputed but on proof. Freight is the joint earning of the vessel and the crew. The holder of a bottomry bond represents the vessel, and stands in the place of the owner; for the bottomry bond includes the freight as well as the vessel. The seamen have also a right in the freight, a *jus in re*, which may be enforced against

that in specie. These rights the owner had no authority to bargain away, especially for a consideration accruing peculiarly to himself. A construction which should hold a charter-party as to freight entire for the voyage, which should separate the freight of the outward from the homeward voyage, and make these dependent on the prosperous issue of the whole voyage, would be at once a fraud on the bottomry holder and the seamen, unless they were parties to the contract. When the question arises, therefore, in the construction of a charter-party, whether freight is due at a port of delivery, if on the whole instrument it is left doubtful, the conclusion of the maritime law would be in favor of the owner. For if it be granted that the stipulation for freight is the language of the owner, the rule that words are to be construed most strongly against the party using them, is the last rule of interpretation to be resorted to when all others fail. *Toull, Droit Francais*, vol. 6, No. 323–4; Dig. 44, 1–99.

We will now look at the terms of the contract. The charter describes the voyage out and home as one voyage. But this is not decisive. In fact, it is of but little significance. The same descriptive words are often, if not commonly, used where the vessel is intended for several successive ports, and it is the universal formula in seamen's contracts; but it is never construed to deprive them of wages up to the last port of delivery, whatever may be the ultimate fate of the vessel. In order to give to this language the effect of consolidating the outward and homeward voyages into one, for the purposes of freight, it must be made to appear from other conditions contained in the instrument, or from its whole tenor, that such was the intention of the parties.

If the freights stipulated for in this charter-party had been a monthly freight, I should think that there would be little difficulty in allowing charter under this contract to Port-au-Prince, and for half the time the brig lay there. And the case of *Brown* v. *Hunt*, 11 Mass. Rep., 41, and *Locke* v. *Swan*, 13 Mass. Rep. 76, would amply justify the decision, if any authority would be needed. There

are decisions, it is true, that have a different aspect, *Patteson* v. *Byrne*, Abbot on Shipping, 560; *Coffin* v. *Stover*, 8 Mass. 252; *Blanchard* v. *Bucknam*, 3 Greenl. 1. But these, I think, stand on the better reason, and are more in harmony with the spirit and equity of the maritime law.

But the charter here stipulated for, is a single gross sum. This looks as though the parties intended a single and not a divisible contract. When the hire is fixed by a monthly sum, though the voyage is described as one, I think the presumption of the maritime law is, that for the purpose of freight, it is divisible into as many voyages as there are ports of delivery. Freight, the hire for the use of the vessel, is due as far as the charterer has had the beneficial use of it, which is to the last port where cargo is delivered. But when the owner stipulates for a single gross sum to be paid on the return of the ship to her home port, he makes the voyage apparently one. But in either case, this presumption is liable to be controlled by other conditions in the charter showing a different intention. Still this appears to be the natural inference, and I think it belongs to the party who denies it, to show that the natural conclusion is not the just one.

In looking into this charter-party, we find that so much of the freight as should be required to cover the disbursements of the vessel at Port-au-Prince was payable there. So much must be considered as earned before the completion of the round voyage, and this might amount to one-half, but was not to exceed that sum. Upon this stipulation it may be fairly asked, as it was by the libellant's counsel, does it not open the contract and let in the equity of the maritime law? The whole of the outward freight is there demandable on the happening of a certain contingency. One might feel inclined to pause on this question; but it is said that this precise point has been decided by the Supreme Court of this State, in the late case of *Towle* v. *Kettell*, 5 Cush. 10. That was a charter-party for a voyage from Boston to Wilmington, N. C., thence to Cape Haytien, and thence back to Boston, for a gross sum of $1500.

So much was payable at Hayti as the master might require for the disbursement of his vessel, and the balance on the discharge of the cargo at Boston. The vessel made the voyage to Hayti and there delivered her cargo, and was lost on her return to Boston. The court held that it was a single indivisible voyage, and that no freight was due. The only difference between the two cases is this; in that case the balance of the freight not required to disburse the vessel was, by the terms of the charter-party, made payable on the vessel's arrival at Boston. In the present case, the time and place for the payment of the residue of the freight is not fixed by the contract, but is left to be determined by the law. The distinction, it may be said, is a narrow one. But if the cases in which the courts have been called upon to interpret charter-parties, where the performance of the entire contract has been prevented by a fortuitous event, are critically examined, it will be found that they have turned on distinctions so minute and subtle that, as is remarked in the case of *Towle* v. *Kettell,* one decision can hardly be relied on as authority for another, unless there is between them a perfect identity. The just rule of interpretation is, I think, that suggested by Lord Mansfield in the case cited from Abbot on Shipping. If there be anything in the contract from which it can be inferred that the parties contemplated a divisible and not an indivisible voyage, for the purposes of freight, it ought to be held to be divisible. This is in conformity with the general rule of law, and meets the justice of the case. This contract made the voyage divisible in a certain contingency, and to a certain extent. Beyond that, no intention is expressed. The balance of the freight is not made payable after the vessel returns to her home port, as was the fact in all the cases cited by the respondent; and it cannot, therefore, be pretended, as was urged by Lord Kenyon in the leading case of *Byrne* v. *Patteson,* that the contingency has not happened on which the freight is payable.

The only reason upon which the defendant refuses to pay the freight on the outward voyage, is, that the whole stipulated freight

out and home is in one sum. The plaintiff has performed one-half the service, and has been prevented by a fortuitous accident from performing the whole. It may be safely affirmed that it is a universal maxim of law, as it is of reason and common sense, that no one is responsible for fortuitous events without an express agreement for that purpose. Dig. 50, 17, 23; Domat Liv. 1, Tit. 1, sec. 3, No. 9. And the general policy of the maritime law is to allow a contractor his reward as far as he has performed his service, and more especially when the other party has received the benefit of it. In this the maritime law conforms to the genius of the Roman law. If an architect agreed to build a house, and when it was partly finished it was destroyed by a fortuitous accident, *si vi naturali, veluti terrae motu acciderit*, Dig. 19, 2, 59; or if an undertaker engaged to make an artificial stream or canal, and before approval it was destroyed, *si soli vitio id accidit, locatoris erit periculum.* Dig. 19, 2, 62. In either of these cases, if the fault was in the workman *si vitio operis id accidit*, the loss fell upon him, if the loss arose from unavoidable accident it fell on the owner. In such cases the workman guarantees his own work only, and the acts of Providence are left to be borne by those on whom they fall. On the authority of these cases, Domat so states the law, Liv. 1, Tit. 4, sec. 3, Nos. 8, 2, and 10, though the price is fixed at one sum, *un certain prix de l'ouvrage entier.* And *Voet* Liv. 19, 2, 37, without any misgiving thus explains the law.

It is true that the common law, in its original features, as they are disclosed in the early reports, inclines strongly against the apportionment of contracts. It is equally true that the elements of the common law were formed and grew to maturity under the Norman aristocracy, when the people had no voice in making it. The rules of law were generally favorable to capital and wealth, and bore hard on poverty and labor, as is always the case when the law is made by an aristocracy. But it is abundantly proved by the late reports, that the humanity of modern judges has struggled hard against the severity of the ancient rule, and has of-

ten made exceptions on slight grounds. The leading case in favor of the old law is *Cutter* v. *Powell*, 6 T. R. 340, decided under the presidency of Lord Kenyon, who, although not much distinguished as a classical scholar was delighted to stand, in his own language *super antiquas vias* of the law. The old doctrine has been met by the solid reasoning of Chief Justice Parker, in *Britton* v. *Turner*, 6 N. H. R., 421. The cases are faithfully collected in Parsons on Contracts, vol. 1, Book 3, ch. 9, sec. 1, particularly note p and vol. 2, part 2, sec. 5. The author himself gives a strong intimation of his opinion in favor of the later doctrine. The broad basis on which the decisions turn is that of apportionment. The distinction on which the decisions often rest, is whether the price agreed is one gross sum, or whether it is made up by a computation of days, weeks, or months. But this can make no difference in principle, but is only important in ascertaining the common intention of the parties. On the whole, as well on the general principles of the maritime law, as on the peculiar phraseology of this contract, my opinion in this case is that the contractor did not become an insurer against inevitable accident, which alone prevented him from the completion of his contract, and is entitled to his outward freight.

The decree will be for $896, with interest, deducting $4 paid and costs.

NOTE BY THE REPORTER. This case was printed in the Law Reporter of July, 1859, though decided some time before that. But as important changes, in the hand-writing of the Judge, are annexed to that report of the case, made subsequently, it is deemed most fitting to insert the opinion as revised in the order adopted.

THE HORACE E. BELL.

A contract for a voyage which has no terminus is void by law. A voyage must terminate at a certain time or a certain port.

Smuggling on the part of seamen is a grave offence, but it is not imperative on the part of the court to forfeit their whole wages, and the law may be satisfied with a fine.

September, 1859.

WARE, *Judge.*

The schooner Horace E. Bell was built at Pembroke, in this State in 1857, and owned, when built, one-fourth by Joshua E. Clarke and three-fourths by other parties. On the 10th of June of that year she sailed from Eastport to Philadelphia on a general freighting voyage, under the command of Joshua E. Clarke, and was taken by him on shares, he to receive a certain portion of her earnings after paying the expense of victualling and manning her, and to pay the other part to the owners. Frederick Clarke as mate and Henry E. Clarke as cook and steward, went in her. She performed several voyages from Philadelphia and Baltimore under this contract, Henry E. Clarke continuing in her until June 18, 1858, when he was discharged on account of ill health, and Frederick Clarke until Sept. 15, 1858. This suit is brought against the vessel for their wages. The libel was served upon her as soon as her return to Eastport and before any transfer, and, therefore, the assignees took equitably as well as legally only the rights of the assignors.

The mate and cook, who have joined in this libel, are both brothers of the master and part owners, and, therefore, may be supposed to know the terms on which this vessel was taken; that by this condition of the contract it was the duty of the master to

furnish the crew with provisions and pay them. I am aware of the decisions of the courts of this State and Massachusetts, that under such a contract the material men lose their claim against the general owners and can look to the master only. In the case of *Skolfield* v. *Watson*, Davies R. 392 (1 Ware), I had occasion to review those decisions, and my opinion there was, that this construction of the maritime law ought not to be extended to seamen unless they were plainly told at the time that for their wages they were to look to the master only. That was a libel *in personam* against the owner, and this is a libel *in rem* and much stronger than that case. The law is so well understood, and the men are so much in the habit of looking to the vessel as their best security, that I feel no difficulty in allowing their lien in the present case.

The defence in this action assumes a different basis. The first ground of defence is that the seamen are in delay, and that they ought to have brought their libel against the ship at the end of each voyage. But when did the voyage end?

In the first shipping articles signed, the voyage is described as one 'from Eastport to Hillsboro and thence to Philadelphia via Eastport, and thence back to a northern port of final discharge at Eastport.' So that by the actual terms of the contract, the voyage did not end until her arrival back to Eastport, and the libels were sued out as soon as she returned. But if we take the voyage according to the understanding of the parties, as a general freighting voyage, when, in the understanding of the parties, did the voyage terminate? The enterprise was that of seeking employment, and when she had discharged her cargo at Philadelphia she might as well go to Baltimore, Norfolk, or any other southern port, as to that to which she did go. She had her choice of ports. If we recur to her original shipping articles, the voyage ended only on her return to Eastport. If we consider the voyage as a general trading and freighting voyage, as there was no limitation of time the contract was void for indefiniteness, for the vessel might never return to Eastport. The seamen might leave the vessel and

demand their wages when they pleased. But there being no limitation in the articles, if it should be construed for reasonable time, then the voyage would not be ended and the wages demandable, according to the French law, until the voyage had come to a conclusion, that is, until her arrival in Eastport. *Emerigon Des assurance*, c. 13, § 3. In any view of the case I think the seamen have seasonably commenced their suit.

The second objection is that they forfeited their wages by smuggling at Baltimore, at the end of the voyage from Porto Rico. This, it is alleged, is an act of dishonesty, or as it was called in the argument, an act of barratry, by which all antecedent wages were forfeited. That there was smuggling is admitted, and I think that the evidence in the case sufficiently proves that the libellants were concerned in it. But the smuggling was not sufficient to forfeit the vessel, which, if it had been over $400 in value, it would have done. U. S. Laws, Stat. of 1797, § 5. The master alone was arrested, and he paid a fine of fifty dollars. If this suit had been against him, this would have been an equitable as well as a legal defence. It is admitted, that on the part of seamen, this is a grave offence and ought not to be lightly passed over. But if the vessel had been arrested, it would not have been imperative in the court to inflict the highest penalty. The case cited in the argument from Abbot's Rep. vol. 1, 258, is an authority for this. The law might have been satisfied with an abatement from the wages instead of an entire forfeiture. In that suit the vessel was delayed in consequence of the seizure, but the court did not forfeit the whole wages and inflicted a fine of twenty-five dollars, only. In this case, as the vessel did not suffer, I think it is not for the master to take advantage of this defence.

The third point made in the case relates to the amount of the wages. It is contended in the answer that, if any are due, there ought to be an abatement at least. Ordinarily the rate of wages is fixed by the shipping articles, and the statutes render this conclusive. Law of the U. S. But the articles may be always im-

peached for fraud or mistake. But in this case there is difficulty in believing that there was either fraud or mistake. The only evidence beyond that of the declaration of the parties in the libel, is the testimony of the master. It was his duty to see that the rate of wages was correctly entered; and without entering on the question how far he is to be believed against them, and he appears to be a fair witness, I feel disposed to allow wages according to the written record. The whole of this enterprise from the beginning, appears to have been unfortunate without faults imputable to any one. But, as the seamen would have no benefit from its being prosperous, so they ought to suffer nothing from its being unprosperous. And in finding the wages at the price in the articles, I do not forget the attempt at smuggling.

The decree will be for the sums found according to the rates stipulated in the articles for the periods of service, deducting advances.

Fessenden & Butler, for libellants.

Shepley & Dana, for respondent.

THE AUSTRALIA.

If a seaman proves unfit for the service for which he shipped, the master may degrade him to another duty.

When unusual terms are introduced into a contract, courts of admiralty require that it be explained plainly to the men, or it will be set aside and they must be presumed to be engaged on the usual terms.

The law of the U. S. of 1790, requires every contract to be in writing, and if not, the law is not binding on the men. They may leave the ship at any time, and demand wages at the highest price paid at that port at any time within three months before their engagements.

The act of Maine, admitting parties to be witnesses, does not apply to the admiralty.

The practice is to allow either party to examine the other on interrogatories, and the answers they give are evidence in the case. But the answers, though under oath, are not properly evidence.

The facts in this case will appear in the opinion of the court.

October 28, 1859.

WARE, *District Judge.*

Michael De Lory, about 21 years of age, engaged at Boston to go in the Australia to an eastern port for her cargo, and thence to Jacksonville in Florida and some port in the West Indies and to her port of discharge in the United States. He engaged to go as cook, provided his services were satisfactory in that office. He made the voyage to Wiscasset, assisted in loading the cargo, and was dismissed for want of competency as a cook. He was a native of New Brunswick, entirely uneducated, as he could neither write nor read, and he was shipped without signing shipping articles. He brings this action for his wages, for damages in being dismissed in a strange port, and suing as well for the United States as himself, for the penalty of twenty dollars provided in the first section of the act of 1790.

On all the evidence I am disposed to admit that he was incompetent as a cook for such a vessel, though he had been employed in that capacity in fishing voyages. In this case, had he been shipped regularly, the rule of the maritime law is well settled that the master might have displaced him and put him to other duty. Every person is presumed fit for the duty for which he engages. *Quisque spondet puritatem artis suae* is a rule of common sense that is found in every system of law. The owner who engaged De Lory has been examined on interrogatories, and says that he was engaged on trial with liberty to dismiss him from the vessel if he proved unacceptable. The libellant has been examined in the same way, and though he acknowledges that he was to serve as cook on trial, and to be dismissed from that employment if he proved not satisfactory, yet that he was to go in the vessel absolutely. It is not probable that he would engage for a voyage eastward, on trial, to be dismissed and find his way home at his own expense, though he might engage as cook on those terms, and he swears positively, that he was engaged for the whole voyage. There is a repugnance in the testimony, but in this circumstance only; and in this discrepancy I am disposed to take his word. That he so understood the engagement I have no doubt.

The law of the sea favors a written contract without, perhaps, making it indispensable. But the men are notoriously inattentive to its terms, and oftener than otherwise, sign without reading it.

They trust to usage and the law. For this reason, on general principles, if there is anything unusual in the terms, that should be explained to the men in such a manner that they shall understand it and it should be balanced by an adequate compensation, otherwise it will be set aside and the men presumed to be engaged on the usual terms, or those required by law.

This is the general law, adapted to the common character of seamen; but that of this country goes farther.

In controversies between the master or owner and the mariners, whether arising on contracts or torts, it is sometimes difficult to

hold the balance evenly between them. The former being usually men of education, and always conversant in business, are astute in providing for themselves. But the men, born, perhaps, with a temper naturally choleric and impatient, that natural infirmity augmented rather than checked by a want of education, quickened by the ungovernable and contentious nature of the element to which, by their calling, they are exposed, and always necessitous, think little of the future. They are thoughtless and incautious in these contracts as well as in their general behavior, and it is not uncommon for their precipitancy to be taken advantage of to their injury. But at the same time there are among them some of depraved dispositions, bent on mischief, who watch their opportunity to exasperate their officers and to stir up the crew to disorder and sedition. But they are persons of incautious and hasty tempers, and the truth generally comes out in the testimony. Courts do not fail to mark a disposition radically bad, but they have no right to presume this without proof, and in this case all natural presumptions are in favor of the man, as well from his admitted want of education, as from the appearance of honesty and simplicity when under examination.

By the act of 1790 (page 131, Stat. of U. S.), every master of a vessel of fifty tons burthen or more, before he starts on a foreign voyage, or one to a port other than in an adjoining State, is bound to have an agreement in writing containing a discription of the voyage and the terms of the engagement, and in default, he is bound to pay his men the highest rate of wages that have been given for three months in that port for the like service, and in addition thereto, a penalty of twenty dollars, to be equally divided between the person suing for the same, and the United States. But by the act of 1840, he is subject to a penalty of $100 for a violation of any of the provisions of that act (No. 19), one of which, in connection with the act of 1790 and 1803, is the having a contract in writing.

How do the owners in this case expect to escape the penal obli-

gations of this act? The only mode is by setting up an agreement to take this man on trial. There is in the act of 1790 (Sec. 1) an exception of servant and apprentices. But it is not pretended that De Lory was either, and with every other man must be made a contract in writing. It may be questioned whether the statute does not, by implication, negative the right of taking any other man on trial. Be this as it may, we have the declaration of De Lory himself, taken on interrogatories, that he was engaged for the whole voyage, and the proviso only applied to his officiating as cook. The law of Maine, admitting parties to be examined (Revised Statutes, c. 82, § 9, No. 72), does not in its terms apply to proceedings in the admiralty, and has been decided not to extend to this court; but according to the course of the admiralty, parties may always be examined on interrogatories on the demand of either party. Though the answer is not properly evidence, being drawn up by the Proctors on the statement of the party. (*Hutson* v. *Jordan*, 1 Ware's R. 393; The Crusader, 1 Ware's R. 448; *Sherwood* v. *Hall*, 3 Sum. 131; *Cushman* v. *Ryan*, 1 Stor. 131; *Jay* v. *Almy*, 1 Wood and Min. 267), the answers to interrogatories, subject as they are, to pass under the ordeal of a cross-examination contrary to the rule of the civil law, are, 1 Ware 410; Pothier Des Obligations, No. 910. De Lory very fairly admits that he was to be removed from the office of cook if, on trial, he proved unsatisfactory. But he is equally positive that he was engaged for the whole voyage. And his answer, supported as it is by probability, is, I think, true. My opinion is, that he must be allowed his wages, for the time that he served, at the highest rate that was given at that port for three months before his employment, and that, according to the proof, is sixteen dollars a month. He must be allowed damages also for the breach of his contract.

Damages by the common law, and this is the decision of natural law, are given as an indemnity, that is, a sum which would put the person in the same situation as he would have been if the damage had not been done. They are matters of calculation for the most

part, if not, are of necessity left to the discretion of the tribunal that awards them, and are sometimes increased and sometimes lessened, according to the nature and circumstances of the injury and of the person who suffers. Parsons on Contract, vol. 2, p. 432; *Domat Lois civiles*, Lib. 3, Tit. 5, *praeambule*; Lib. 1, Tit. 2, No. 18.

If the injury is wanton, that is, if done intentionally, without opening the question on which the authority of great names is arranged on both sides, whether exemplary, vindictive, or penal damages may in any case be given (Greenl. Evidence, vol. 2), it will be admitted by all that full damages ought to be allowed. The dismissal of a seaman without cause is an injury of this character. If De Lory was not qualified as a cook, he was fit for some employment on the vessel; and this is apparent from the master putting him to other duty besides that of cooking. The case of a seaman by thus unexpectedly being thrown out of employment does not call for aggravated damage, but the loss of time is something. It is greater when he is a foreigner, when his natural home is not among us, and he is without friends and is dependent on his own resources. And because in any way in which they are viewed they are small, is no reason why they should be withheld. Besides ordering his wages to be made out at the highest price paid for a cook, I shall allow $10 damages for the breach of contract.

The penalty of $20 is as expressly awarded by the statute as the increased pay, and I see no difficulty in allowing it in a libel for the wages. The libellant has sued for it in the name of the United States as well as his own.

Decree $33.51 and costs.

Sewall, for libellant.

M. Smith, for respondent.

THE MARTHA WASHINGTON.

The constitutional power of Congress to pass the law of 1850, § 1, relative to recording the transfer of vessels, raised but not decided.

A court of admiralty has no jurisdiction to decree possession of a vessel to the owners of a majority, when a title to such vessel is set up in mortgage.

January 10, 1860. This case came up on an agreed statement of facts, about which there was no dispute, and the principal point argued was the validity of the law of the United States of 1850, § 1. It was to obtain a decision on this point, on which there were conflicting opinions, that the suit was brought. The court thought itself obliged to decide it on a narrower ground.

WARE, *District Judge.*

This is a libel against the Martha Washington, a brig of about 270 tons burthen, by Blanchard and Sherman claiming 5-16 in full title. In an agreed statement of facts it is admitted that she was built in 1853, at Surry, in the collections district of Frenchman's Bay, within which all the owners resided, and, on the 5th of December, she was registered in that district. On the 25th of October, 1855, she surrendered her registry and was enrolled. On the 7th of December, 1855, being at Norfolk, and desirious to make a voyage to the West Indies, she surrendered her papers and took out a temporary register in that office, and under that register was employed during the whole of 1856 and the greater part of the year 1857.

The libellants claim title to one-half of the brig by virtue of a mortgage of Wm. Coggin, dated Nov. 21, 1856, recorded in the collector's office at Frenchman's Bay, Nov. 27, 1856, and at Norfolk, May 11, 1857, and by the clerk of the town of Surry, Nov. 18, 1857. To this title of the libellants, Phebe Flood has put in

a claim to three-sixteenths which is derived from a mortgage of the said Coggin, dated April 1, 1856 and recorded in the collector's office in Frenchman's Bay, Sept. 1, 1856. Amos D. Dolivar has put in another claim to one-sixteenth by a mortgage of the same Coggin, dated Sept. 1, 1856, and recorded the second day of the same month in the collector's office at Ellsworth.

Coggin, it is admitted, owned one-half and no more of the brig. Of this he conveyed one-half by two mortgages to Flood & Dolivar, both of them of earlier date and record, in the office of the collector at Frenchman's Bay, than the libellants, but neither recorded in the office of the clerk of Surry. He then conveyed the whole of his half to the libellants, who had their mortgage recorded in the office of the collector of Norfolk, and with the clerk of the town of Surry. Coggin had his residence at Surry till the time of his death.

The libellants claim possession on the ground of title to a majority of the vessel, and to one-half, their title is a foreclosed mortgage under the revised statutes of Maine. The words of the law are 'No mortgage of personal property made to secure the payment of more than thirty dollars shall be valid against any other person than the parties thereto, unless possession of such property is delivered and retained by the mortgagee, or the mortgage be recorded by the clerk of the town in which the mortgagee resides.' Ch. 91, § 1. The third section provides that the property may be redeemed at any time within sixty days after the breach of the condition. That time had elapsed before the filing of the libel, and the parties claim an absolute foreclosure by operation of law.

To this libel answers are interposed by Flood and Dolivar, claiming title, one to three-sixteenths and the other one-sixteenth parts of the same vessel, on mortgage prior in point of date of the conveyances and of the record in the collector's office at Frenchman's Bay, to that of the libellant. Their claim is under the United States statute of 1851, § 1. The words of this statute are 'That no bill of sale, mortgage, hypothecation, or conveyance of

any vessel or part of any vessel of the United States, shall be valid against any person other than the grantor or mortgagee, his heirs and devisees and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled.' In both statutes there is a reservation of bottomry contracts and implied liens, which it is immaterial to consider in this case. It may here be remarked, that though the law of the State was enacted in the revised statutes in 1857, it was but a re-enactment of the law of the State dated back to 1839.

On these mortgages the libellants shew a good title under the State law, and the claimants under that of the United States. If these two laws had proceeded from the same authority, that is, if both had been enacted by the same sovereign power, but little difficulty, I think, would be found in holding that of the United States an implied repeal of the State law, and that a compliance with the terms of both would be unnecessary. There appears to me to be a real difficulty in yielding to the authority of the case of *Thomas* v. *Van Vechen*, 5 Abbott, 452, which was quoted at the argument, that to secure a mortgage, the mortgagee must record under both laws. Both provide for the same case, they cover the whole matter and they have the same penal sanction, that is, the nullity of the conveyance if the terms of the law are not complied with. They appear to me to fall under the common rule, that a subsequent law, relating to the same matter, is a repeal of a prior, so far as the provisions of the two are repugnant or inconsistent, and if the second covers the whole matter of the first, it is a repeal of that *in toto*. And it is so plain a principle of the constitution and has been so often recognized, that in all matters to which the authority of the United States extends, their laws are paramount to those of a State, that it seems superfluous to refer to any authority on this point.

If this be correct the rights of the parties under these mortgages must be decided by the United States law, if it is in force. It is

so if Congress had the constitutional right to pass it, for it has not been repealed. This brings up the point that was mainly, I may say solely, relied on at the argument, that the act of 1850 is purely void from excess of power; that Congress, in enacting this law, passed their constitutional limits, and the act is therefore a pure nullity.

If Congress has the power to pass laws regulating the title to vessels generally, it must be derived from the grant of power in the first article, § 8. 'To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' The clause at the end of this section, 'To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, &c.,' it has always appeared to me cannot enlarge the powers of the general government, because this refers only to incidental powers, which would necessarily follow the grant of the general power without express words. If it did increase their power, it would be neutralized by the tenth amendment. This provides that 'the powers not delegated the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.' This is a complete negation of a constructive power on the clause, which I have mentioned.

The grant of power to regulate commerce, it is admitted, includes that of regulating navigation, but it includes it as an incident merely. Congress has the right to regulate foreign navigation so far as it is engaged in carrying on our commerce. Yet no one would contend that they had a general power over vessels belonging to a foreign nation. So Congress has the power to regulate ships or vessels just so far and no farther than as they are employed in carrying on trade. There can be no doubt that, under State laws, any one may own a vehicle made of wood, iron, and copper in any form, whether in that of a ship, a barrel, or a box, and may transfer it under what conditions he pleases without reference to the United States laws. It is only when it becomes a vehicle in carrying on trade that it comes within the reach of the United

States authority. And whatever may be the form, there can be no doubt that the United States, so far as it is used in trade and commerce, may regulate the transfer and the title generally; that is, so far as it is used in foreign and inter-state trade and trade with the Indians. To this limit was the power of Congress carefully confined by the Supreme Court in the great case of *Gibbons* v. *Ogden*, 9 Wheat. 1, 197. Under this power Congress may order ships or vessels to be registered and enrolled, to be commanded and manned in a particular way, to be under a peculiar police adapted to the service, and be recorded in the custom-house, or they shall have none of the privileges and immunities attached to United States vessels. But the penalty by which this law is enforced must be confined to these privileges. The power of the United States must be restricted to taking away that which the United States can give. The laws of the Union never contemplate vessels as property simply, but as property employed in a particular way, or for a particular purpose. The tenure of all goods in civilized society is fixed by law. As property, the owner holds it under State laws. It is only as engaged in trade, that they hold it under United States law. What the State gives, the United States cannot take away. But the privilege of engaging in a certain trade is given by the United States, and of that vessels, like any other property, may be deprived.

If the authority contended for were allowed it would, in principle, go somewhat farther than is at first imagined. The only ground on which it can be pretended that the United States can regulate the mode of transfer of vessels, is that they may be, and most usually are, used in carrying on trade. But if for this reason alone they may regulate the title generally, I do not see but that with the same force it may be applied to barrels and boxes, nay, to wagons, carts, and horses, because they may be used in carrying on inter-state and Indian trade. A cooper or a pedlar would be surprised to be informed that they could not convey a title to a barrel or a wagon without first consulting the United States laws.

It will not be pretended that a decision against the validity of the law of the United States, or one that should restrict its operation to the immunities granted by their laws, would not be attended with difficulties of the gravest character. There can be no doubt that they can regulate the transfer of vessels so far that they shall have none of the privileges granted by them, unless by a compliance with their laws. In this way only, can vessels be entitled to engage in the public trade, and without these privileges, they would be of little value, while other vehicles derive little of their value from this privilege, as barrels, boxes, carriages, etc. And there would be a real and substantial difficulty in separating the immunities from the thing itself, and allowing these to be transferred independent of the thing itself.

The question raised in this case is one of the greatest importance, as it affects the powers of the general government and of the separate States, as well as the commercial community at large. And it will require very grave consideration before it is decided either way. As property generally, the owners hold vessels as they do all other property under State laws. It is not perceived how, in this case, the United States can take away, in the form of a penalty, what they cannot give. This power of control is not expressly granted by the constitution. That of regulating navigation, so far as it is engaged in trade, is but an incident, and to allow the United States a general control over the transfer of vessels, when their own interests are not concerned, would be grafting an incident on an incident. For it will not be pretended that Congress have this power because the public good would be promoted by having it lodged within them. If the plea of utility, of which, from the necessity of the case, the general government would alone be the judge, were sufficient, ours would be a government of discretion and not of fixed rules. And it is an elementary principle of law, that when one acts under a delegated authority he must show it to exist either by express grant or necessarily incident to some express grant, or it does not exist. The Supreme Court, in

one of the most carefully considered opinions ever delivered in that court, have given this construction to the constitution. *Martin* v. *Hunter*, 1 Wheat. 326–349. The constitution is to be interpreted like every other grant of power. See Parsons on Maritime law, 1, p. 47–51.

If it were necessary to decide this question on this case, I should desire a longer time to consider it. Every question involving the constitutional power of the general government is important, and there can be scarcely any one more so than this. Within the grant of the constitution the power of the general government is supreme, and overcomes all State legislation, but beyond that its acts are merely void. The conveyance of vessels is of daily occurrence, and it is of the last importance to ship owners when the laws are in conflict, to know whether they are to obey those of the State, or the United States. Although this question must be decided, I think it cannot be in the present case, and the courts of the United States are not in the habit of volunteering their opinions when they are not called for. Sufficient for the day are the evils and trials which the day brings. My opinion is that the case must be determined on the question of jurisdiction, and, as this is preliminary in its nature, it cuts off all questions which arise on the merits.

The title set up by this libel is founded on a mortgage, and the prayer is for possession. It is not pretended that the plaintiffs owned a majority independent of the mortgage. Without a majority they would have no right to claim possession against other co-tenants, and the transfer of the possession must have its foundation in that title. In the case of *Boghart* v. *The John Jay*, 17 How. 399, the Supreme Court held that the court of admiralty had no jurisdiction to decree a sale of a ship to pay an unsatisfied mortgage or to transfer the possession to the mortgagees. This case was confirmed in that of *Schuhardt* v. *The Ship Angelique*, 19 How. 239. It was acted on in that of the *William D. Rice, 20 Law Rep. 500. It is

*Ante page 134.

on the ground that the title set up is essentially one in equity, and though a court of admiralty professes to decide *ux aequo et bono*, on the general principles of equity, it has none of the peculiar powers of that court in the investigation of the title and the equities under it. How far a court of admiralty may look into a mortgage when it comes up collaterally, is another question; but when this lies at the very foundation of the case, it is too well settled in this country, as, before the statute of Victoria, it was in England, that the court looks only at the legal title, to be brought into doubt. It is equally clear that the consent of parties cannot give jurisdiction. If this defect appears at any time in the course of the trial, although not raised by the pleadings of the parties, it is fatal. So it has often been decided by the Supreme Court.

The libel dismissed with costs.

Shepley & Dana, for libellants.

Fessenden & Butler, for respondent.

NOTE BY REPORTER.—The decree of the District Court was affirmed by the Circuit Court at Sept. Term, 1860, 1 Cliff. 463.

THE LUCY ANNE.

A court of admiralty has jurisdiction to decree the bounty allowed to persons employed in the cod fishery, and a claim for this may be united with a claim for an account of the fish taken during the voyages.

A custom is obligatory on the parties only when the law does not provide for the case.

When a condition precedent is annexed to a gift, that cannot be repudiated and the gratuity received unconditionally.

The reasonableness and equity of an agreement between owners and seamen will always be examined by a court of admiralty.

March, 1860. This case originated in the following state of facts. The complainant, Philip Rines, a minor, had been engaged in the service of the schooner Lucy Anne, of Southport, District of Wiscasset, during the cod-fishing season of 1859. The season embraced two voyages, one in hand-line fishing, the other in a trolling voyage. After the completion of the second voyage, Rines left with the master's consent, who did not settle up his wages. The terms of service and compensation were embraced in the articles of agreement, usual in this district, the substance of which is given in the opinion of the court. After the sale of the fish, the master, being at Wiscasset (the residence of Rines), called him aside and exhibited an account made up of various items of charges for supplies, outfits, and deductions for absence, extra help, etc., absorbing, or nearly absorbing, all his earnings from his catch of fish. No allowance of his share of five-eighths of the bounty was reckoned into the proceeds of the voyage.

The father thereupon founded a libel on the facts, which was filed, and process issued against the vessel, which was duly arrested, and in the course of the trial the rights of fishermen, in the premises, to a full and just account of the fish taken, and to the entire value of the same, and to each man's share of five-eighths of the allowance of bounty received by the owners of the vessel, came

up for settlement and adjudication on the principles of law and equity, as administered in courts of admiralty and maritime jurisdiction.

WARE, *Judge.*

This libel is filed by Philip Rines, a minor, by his father, and next friend, against the fishing schooner Lucy Anne, of about thirty-one tons burthen, claiming his share of the bounty, and an account of the fish taken in two trips in the season of 1859. No question has been made as to his engagement, or the time of his service. The defence relied on is, first, that he has been fully paid, for which his owners have his receipt; and, secondly, misbehavior, negligence, and desertion, during the voyage.

But a question, in its nature preliminary, is made, that a court of admiralty has no jurisdiction over the question of bounty, and that this can be recovered only in a suit at common law. The provision of the law is, that there shall be paid to every vessel of thirty tons burthen, and over, at the rate of four dollars a ton, that shall be engaged in the cod fishery during the season, three-eighths of which shall belong to the owner, 'and the other five-eighths thereof shall be divided by him, or his agent, to and among the several fishermen who shall have been employed in such vessel during the season aforesaid, or part thereof, as the case may be, in such proportions as the fish they shall have respectively taken bears to the whole quantity of fish taken on board such vessel during such season.'

The consideration of this allowance is essentially and exclusively maritime. It is measured to the men in proportion to the fish they have taken, and must be considered like the double pay allowed to seamen when they are put on short allowance, and the three months' pay allowed when discharged in a foreign port, as additional wages. It is a gratuity offered to the men to engage in this laborious, and not usually lucrative service, forming a nursery and school for seamen, who are always ready to engage in the public

service when they are wanted. The law does not, indeed, say that they may recover it in a libel as wages; but it treats them as seamen, giving the same remedies against them for enforcing their contract, and subjecting them to the same penalties. The allowance is paid to the owner, and he is bound to pay it over to the men. I can see no room for doubt that a claim for the bounty, and for an account of the fish taken in the voyage, may be united in the same libel. They relate to the same subject-matter, and if the bounty is to be considered an additional compensation, are both of admiralty jurisdiction.

The first objection to the libel, on its merits, is the settlement made in January, and the receipt in full of Philip of that date. This settlement was on the basis of the custom of Southport, and assumes the validity of that custom. Waiving the question of the reasonableness of that settlement,—and as it departed from the law, whether it was explained to the libellant, and fully understood by him; whether he gave up any of his legal rights without receiving a full consideration therefor, which as a fisherman having the rights of a seaman, a court of admiralty will always look into;—setting aside these questions, it is manifest that the case brings up the binding force of that custom. The settlement refers to this, and this has been the principal question which has been argued. It is, in fact, to settle this question that the suit is prosecuted, for the amount in controversy would be scarcely worth the expense of litigation unless this question lay at its bottom. But this is important, both as a legal question and in its practical consequences, and deserves a deliberate consideration.

Custom certainly may have the force of law, and be equally binding, when it is not expressly referred to in the contract. In all civilized and uncivilized countries a large portion of the transactions between man and man is left to be regulated by usage. And this usage is binding on the parties because they make their engagements in reference to it, and it comes in and silently makes part of the contract. This is the case when no reference is made

to the custom; and it is still more so when the parties themselves refer to it. But this is only also when the legislature has not expressed its will on the subject, or when, as is not uncommon, the general rule is established, that the parties are expressly allowed to derogate from the law by their particular contracts. But when a departure from the rule of law is not expressly or impliedly allowed, the law prevails; and this for the best reason, because every party is supposed to know the law and make this a part of his contract, unless he expressly provides otherwise. Seamen, however, have at all times, from their habitual carelessness and improvidence, from their own ignorance and the superior knowledge and the habits of business of those who deal with them, been held to be peculiarly entitled to the protection of courts of justice. They have been treated in some manner as minors, incapable of waiving their legal rights without these are fully explained at the time, and a full and adequate consideration is made for them. If the case rested here a duty might be imposed on this court to see that a full equivalent for the bounty was allowed by the custom of Southport.

But the question in this case is not merely whether custom can do away with an express provision of a statute, but whether a grant of the legislature, supported by a consideration can be abrogated by a custom. This grant of a bounty is made only to vessels qualified by law to carry on the cod fisheries. The United States alone can give that qualification, and this would be a sufficient consideration to uphold a contract in any case. The ship cannot receive the bounty without the requisite qualification. This, then, is a gratuity to the vessel, and it is given on the express condition that five-eighths shall go to the fishermen, and to this extent it is a gratuity to them, and it is given them on condition that they inure themselves to this hardy service. If they should choose to waive their rights, they could not do it without the consent of the United States. The donor may annex such conditions to his bounty as he pleases; nor at least when he has an interest in his liberality, can the beneficiary repudiate the conditions without the consent of the

donor. He cannot take that as a free gift to which a condition precedent is annexed. Independent of the last clause of the contract, by which the parties reserve to themselves all the benefits to which they are entitled under the act for the government of persons employed in the fisheries, I can entertain no doubt that the custom is void.

Besides, so long had the practice prevailed in this district of settling with the fishermen without paying to them any part of the bounty, that from the whole evidence it is evident that they were uncertain whether any part was due to them. The libellant would be entitled to relief on common principles, taking into view his occupation, on the ground of a surprise. There must be a decree for the bounty. Whether the custom of Southport is a beneficial one or not, is a question into which the court cannot examine. The United States have a perfect right to affix such conditions to their gratuities as they please.

The next question is, to what part of the bounty is Rines entitled? Five-eighths is to be distributed among the men, respectively, in the proportion which the number of fish taken by each bears to the whole taken on board the vessel. In the first trip there is no controversy. The fish were taken with lines, and the fish of each man were put into a kid by themselves, and faithfully counted out at night. The entry of them at each night was made on a slate in the presence of the whole crew, so that every man had an opportunity to see that his fish were rightly counted; and the week's work was on Saturday night transferred to a book in ink. This I think a sufficient entry. In this trip, according to the account, Rines took 1,337 fish.

In the second trip the fish were taken by a troll. This is a new mode of fishing, with which all the men were equally inexperienced. A troll, as described by the witnesses, is a long rope extended on the water for many fathoms, with baited hooks attached to it, about three or four feet apart. This is sunk in the water and occasionally drawn up with the fish on the hooks. The whole crew is em-

ployed in the management of the troll, and the fish come up in a mass. Though the troll shows what the whole have taken, the share of each individual cannot appear in this mode of fishing. But the law requires the bounty to be distributed among the crew in proportion to the amount taken by each individual. When a part of the time is spent in troll fishing, and a part in taking with lines, I know of no more equitable way of dividing the troll than to allow to each man a proportion equal to that which he has taken with the line. This may be considered as indicating a fair average of the efficiency of each man.

The whole number of fish taken on the first trip with lines was 7,958, of which, Rines took 1,337. That taken by troll fishing was 4,000. This would make Rines' share 670, and added to 1,337 will make 2,007. His share of the bounty will be $13.06.

The libellant also demands his share of the fish. I know of no reason for doubting the account of John Cameron of the proceeds of the sale of the fish, and that the proper deductions were made of salt, the expenses of cure, freight, and commissions. According to this account, the net proceeds of the sale of the fishermen's part were $464.35. Of this, Rines' share was $78.93, and to this add his share of the bounty, $13.06, and we have $91.99 as the balance due from the owners.

Against this demand, the owners have filed their account of offsets of $70.33.

This libel is brought by Philip, a minor, by his father and next friend, and there can be received in offset only what went to Philip, or what he authorized to be charged against him. What was for Moses Rines, the father, cannot be charged against Philip. It is true that the father might appropriate the earnings of his son to himself. He might also leave the earnings of the child to him, and the son's bringing the libel himself, with the authority of the father, must be considered as a sufficient proof of emancipation. We may strike out the charge in Lincoln's bill of $9.23. With respect to Lenox's, though I think that there is some doubt as to part of the

charge, my opinion is that, as Philip gave his order for the payment, it ought to be allowed. There is a charge of six days' work on board the vessel in Rines' absence. According to the custom under which the contract was made, certain duties on board the vessel were to be performed by the men. But of such a charge as this there ought to be some better evidence than a simple charge in a pencil account, or the testimony of a witness. The absence of a seaman should be noted in the log-book at the time, both to show that there was a delinquency on the part of the seaman, and that it was such a one as in the opinion of the master or skipper ought to be noticed. Independent of this, Russel was from the same town, and was absent at the same time, and about the same number of days with Philip; he was charged with but one day's labor for his absence. As he was one of the crew, and had the same labors to perform, if I allow against Philip the same, I think enough will be allowed.

Decree for $29.51, and costs.

Sewall and Willis, for libellant.

Shepley & Dana, for respondents.

THE BRIG CUBA.

By the general maritime law, the contract for freight is an entirety, and includes both carriage and delivery.

The exception, dangers of the seas, excuses the master for a non-delivery, but does not authorize a demand of freight.

By a special contract, by which the amount of freight was made to depend on the gross gauge of the casks delivered, it is immaterial how the loss was occasioned, whether by ordinary leakage or the dangers of the seas.

May, 1860.

WARE, *District Judge.*

By the charter-party, dated February 23d, 1860, the brig was to proceed to Portland, and there, at the expense of the charterers, to take in a cargo or ballast and thence proceed for Matanzas or one other port on the north side of the island of Cuba, and there receive a full return cargo of molasses, 'both under and upon deck,' for her port of discharge in the United States, north of Cape Hatteras, and not east of Portland. The charterers were to pay all port charges, to advance what should be necessary for her disbursements at Cuba, and pay $3.62½ per hogshead 'of 110 gallons gross gauge of the casks delivered, which is to be in full of the voyage out and back.' The brig proceeded on her voyage successfully, received her cargo at Portland, and delivered it at Matanzas, there took in a full cargo of molasses, both on and under deck. But on her return to the United States, she encountered a violent gale, and for the safety of the vessel, and the lives of all on board, she was obliged to sacrifice her deck load, consisting of 60 hogsheads of molasses. These were voluntarily stove by the crew, and the contents allowed to escape into the water, they cutting the hoops at one end, and breaking the heading. Of these casks, 56 were brought to her port of discharge at Portland, and four were lost overboard. The violence of the storm was such that 26 of the

casks under deck lost either the whole or part of their contents, and were found by the custom-house gaugers to be empty. The parties not being able to agree on the amount of freight due, this libel is brought, claiming freight on all the casks brought home, according to their gross gauge. The respondents resist this claim, but offer freight for all the molasses actually delivered.

It is clear that by the general maritime law, freight, whether by charter-party or bill of lading, is due only for articles delivered. The contract, though it consists of two parts, is necessarily one, unless otherwise provided. It is both to convey and deliver, and is not completed until the delivery. It may be agreed that freight shall be paid on all the goods received on board, as is frequently done in the case of live stock, which is much exposed in the transportation; but, unless the parties otherwise agree, freight is due only for that which is delivered, or for which there is a lawful excuse for non-delivery. 3 Kent, 225–6; 1 Parsons, Mar. Law, 142–219. If casks or boxes in which goods have been packed arrive empty, or nearly so, so that the goods are not worth the freight, though it was formerly a much disputed question, it is now settled that they cannot be abandoned by the shipper for freight, when this is by ordinary leakage or the natural vice of the articles. 3 Kent, 324; 1 Valin, Com. 670; Pothier's Charter-Parties, No. 57; Abbot on Shipping, 433–5, American Edition. But if lost not by ordinary leakage, but by the dangers of the seas, no freight is due. This will excuse the carrier from paying the price of the goods, but not from a delivery. In the case of ordinary leakage, the carrier has performed his contract, so far as depended on him; in the latter his contract is to carry and deliver the goods, the dangers of the seas excepted, and as he is prevented from a delivery by these dangers, his freight is not earned.

In this case, it is not disputed that the molasses was lost by the violence of the elements, and the question is, whether the special terms of the contract control the general law, for that governs unless excepted by the contract. This is a libel, not on a bill of lad-

ing, but a charter-party. The vessel at the time of the charter was lying at Boston, and by its terms she was to proceed to Portland and take in cargo or ballast, and thence to proceed to Matanzas or one other port on the north shore of the island of Cuba, and there receive a full return cargo of molasses, both under and upon deck, for her port of discharge in the United States. The whole compensation was to be dependent on her return cargo; for she was to receive nothing for that bound outward. The master stipulated for a full cargo. No question has been made but that a full cargo was received. The amount of this for which freight was to be paid might be ascertained by the amount received at the port of lading, or delivered at the port of discharge. But the parties to this contract have adopted neither. But $3.62½ were to be paid for the casks, delivered, gross gauge of the casks, and 110 gallons of this gross gauge was equivalent to a hogshead. The counsel for the defence contends that those casks only were to be measured from which no more liquors were lost than what might be considered as the usual leakage, and not what was occasioned by the dangers of the seas. But the contract contains no words limiting the freight in that way. They are casks delivered, whether they contain much or little, or none at all, and whether the leakage was occasioned by the dangers of the seas or not. And we are not at liberty unnecessarily to introduce words, which the parties have not seen fit to use, when these are free from ambiguity and have a plain sense by themselves. If these show a contract, not prohibited by law, they are binding on the parties according to their ordinary meaning. As the whole freight of this vessel was to be paid on her return cargo, and she was to have nothing for her outward trip, it was natural that this should be stipulated on the most advantageous terms. Such, we are entitled to presume, was the common intention. I can see no reason why freight should not be allowed on the twenty-six casks which arrived below deck.

For the four on deck, which were lost overboard, no freight is claimed. The fifty-six came in a dilapidated state. They were

not measured by the custom-house gauger, but were by Mr. McAllister, the city gauger. According to his account the hoops were cut at one end and the heading stove, so that they could not be gauged with perfect accuracy. He gauged the capacity of the hogsheads as near as he could, and for the residue he made an estimate. It is contended that these were delivered in such a state as not to entitle them to be measured as empty casks. This must be determined by the terms of the special contract. The words of the charter-party are casks delivered. The object of the parties could not be the casks themselves, for these could be of very little value. The object of the shipper undoubtedly was the contents of the casks, and casks are referred to merely to determine the quantity of molasses. That was to be ascertained by the gross measure of the casks, and the shipper took on himself the risk of loss, by whatever cause it might be, by the dangers of the seas, unavoidable accident or ordinary leakage. Though they could not be gauged with perfect accuracy, they could be nearly so, and I think sufficiently so to entitle the master to his freight under this contract; for, it is to be recollected, that the master's whole compensation was to be on the return cargo. Commercial contracts are to receive a reasonable, not a technical construction. This is more consonant to the minds of merchants, and an exact technical meaning of words is not to be given to them, unless that was clearly intended.

Shepley & Dana, for libellants.

Rand, for respondents.

THE SHIP JOHN HENRY.

If two vessels come in collision, with faults on both sides, or the fault is inscrutable, the damage is divided between them, by the maritime law.

At common law, where the plaintiff can recover only on the strength of his own title, and not on that of the weakness of his adversary, his complaint is rejected, if the collision is traced in part to his own fault.

December, 1860.

WARE, *District Judge.*

The ship John Henry, of Bath, J. Carver, master, of about 550 tuns burthen, sailed from that port for Savannah on the 10th of August last, on a south-west course, and about the same time, the schooner Wm. A. Richardson, J. Bailey, master, of 170 tons burthen, sailed from Newburyport for Porto Rico on a course S. E. by south, half east. They were sailing on converging lines, and on the 15th, and between nine and ten in the morning, came in sight of each other nearly abreast at about one mile or three-fourths of a mile distant, in latitude 41, 34 north, and longitude 69, 01 west. There had been a heavy fog during the night, which partially cleared away in the morning; and the wind being north-east, blowing a breeze, of between six and eight knots an hour abaft the beam of each, both had a fair wind. If they continued their course there would be manifest danger of a collision. The ship, having the wind, luffed into a course about south and the schooner bore away into the same. Both continued on that course for some time, but how long is uncertain, and there is some uncertainity, at least the counsel are not agreed, whether at this time they came within speaking distance. The ship then luffed more into the wind, and the schooner bore away more, but the latter soon came into her south course, while the ship hauled to the wind

longer; but after, gradually wore around, and consequently must have come into a course nearly parallel with the schooner. Exactly how long they continued this course is uncertain. Either when they first met or at this time the schooner hailed the ship. She continuing to luff and the schooner continuing her southerly course without changing it, or coming more into the wind, as the testimony from the schooner is, the vessels thus came in collision, so that the larboard bow of the ship struck the larboard quarter of the schooner at an acute angle, cutting her down in such a manner that in a short time she filled with water. The crew of the schooner were saved on board the ship, and her wreck, two or three days afterwards, was taken up by another vessel and towed into another port and there sold for salvage.

For this collision thus taking place in open day, with sea room enough, a fair wind for both vessels and a moderate breeze, the parties have two theories.

The first, that of the schooner, is that she, after for a short time bearing away before the wind, hauled into a course due south, and steadily kept that without change, while the ship, after luffing for a time, came down before the wind and struck her while sailing in that course. It is admitted that the man at the schooner's wheel left a moment before the collision, which would have made it haul more into the wind. But this was when a collision become inevitable and could not have led to it. Exactly how long a time intervened between the vessels' first coming in sight, and that of the collision, cannot be ascertained, but from the testimony and the admitted facts it must have been as much as fifteen minutes.

To this theory the counsel for respondent objects that the acknowledged facts are irreconcilable with it. The schooner sailing on nearly a right line due south, the ship luffing into the wind and then coming down on this line, must have sailed in a curved line and had a longer distance than the schooner. If they sailed nearly equally, the schooner must have been ahead sufficiently to have allowed another vessel to pass under her stern. It is an ad-

mitted fact that the schooner, with a free wind, out-sailed the ship, and from all the testimony as well as the undisputed facts in the case, that she sailed about as fast under the lea of the ship's sails, when on a course nearly parallel. As this continued about fifteen minutes and the schooner was running about seven miles an hour, allowing for the ship making a circuitous course, she must have been nearly a quarter of a mile ahead. They must, therefore, have met in a point between the two courses in endeavoring to pass each other's track. Both parties have illustrated the theories by diagrams, but I can see no sufficient answer to this argument. It rests on certainties, and my opinion is that the vessels met in endeavoring to cross each others track.

If this be so, the ship must have borne away before the wind and the schooner have luffed into it too soon, and there have been faults, or error of judgment, on one side or the other or both. It becomes important, therefore, to determine in whom it lay; for an error of judgment is imputed as a fault. The direct testimony is, of necessity, confined to the two vessels, and if that be followed on either side exclusively, this might not be difficult, as each would naturally endeavor to throw the blame on the other. Accordingly, on the side of the schooner, it is said, that while she kept her course due south, the ship, in endeavoring to cross her track by coming under her stern, bore away too soon. But as from all the evidence the vessels sailed at nearly the same rate, if the schooner had kept steadily her course of due south, she must have been, at this time, sailing at the rate of six or seven miles, more than her length in advance, while the ship was crossing down from more than speaking distance. They could not have met without the schooner changing her course, nor could they have met without the ship changing. The only place they could have come together was in the space between the two. And this agrees with the testimony of both sides when compared. For while on the one the witnesses say that the schooner luffed to run across the ship's bows, on the other it is said that the ship bore away to come under the schooner's stern.

In this state of the case the cause of the collision may have been an error of judgment on the one side or the other or on both, or from the testimony, which is all we have for our guide, the cause may be uncertain. That two vessels meeting in the open sea, in broad daylight, with a moderate and fair wind for both, and both equally bound and desirous to keep out of the other's way, cannot come into collision without errors somewhere, is clear. An eye witness, seeing the manœuvres of both vessels from a point out of danger, might see where the fault lay, and would give a more impartial, if not sounder judgment than could be obtained from either of the vessels in danger. But this is not our situation. We can form our opinions only from the evidence, and the witnesses on each side clear their own vessel and charge the blame on the other, and on each side the witnesses are equally credible. The only conclusion that I can extract from this conflict of testimony is, that there were errors of judgment on both sides, and this antecedent to all evidence is the most probable solution. If this was not the case, the fault is inscrutable. In the hurry, excitement, and perturbation of the moment, either, not knowing what the manœuvre of the other might be, without an impeachment of his intention, might make a mistake.

In either of these cases, of faults on both sides or the fault inscrutable, taking the rule of the maritime law is the same, the damage done shall be divided equally between the two. The rule of the common law, as is, I think, correctly stated by Lord Campbell, is different. *Dowell* v. *The General Steam Navigation Co.* 22, English Law and Equity, 158. The plaintiff can recover only on the strength of his own title and not on the weakness of that of his adversary. That law had its foundations laid in an early age, when witnesses and parties were more unscrupulous than in this, when the lessons of experience are better understood, had a great fear of injustice on the part of prosecutors and a particular dread of the slippery conscience of witnesses. It required, therefore, of the plaintiff to come with clean hands, and it would be a

conclusive objection to him that the injury was caused in part by his own fault. The maritime law which seeks less logical consistency than substantial justice, and is governed in part also by the general interest of commerce on the high seas, when there are faults on both sides, or the fault is inscrutable, divides the loss between the parties. *The Schooner Catharine* v. *Dickinson*, 17 How. 173; 1 Pearson's Maritime Law, 122.

The decree will therefore be, that the whole damages to both vessels be put into one mass and equally divided between them. A court of admiralty has full jurisdiction over costs, either to give, divide, or refuse them altogether, and has sometimes gone so far as to throw them on the prevailing party, when he has evidently sought the litigation. But in the present case I can see no sufficient reason for departing from the common rule. The costs will therefore follow the damages, and the amount of these will be referred to a commissioner to report.

Cushing, for libellants.

Shepley, for respondents.

U. S. *vs.* WHIDDEN.

Suit on a debenture bond.

When goods entered in debenture for re-exportation, have been exported, passed through a foreign custom-house and are subject to a retail trade, they are mixed with the common merchandise of the country, and may be again imported into this country.

The interpretation of doubtful and ambiguous words in a particular law, are, in revenue laws, to be explained in subservience to the common policy of the country.

February, 1861.

WARE, *District Judge.*

This is a suit on a debenture bond in a penalty of $400. The condition of the bond is that the penalty shall not be due if the goods named, 230 ship's knees, shall not be relanded at any port or place within the limits of the United States, and the certificates required of their delivery at Newport, N. S., or at any other port or place out of the United States shall be produced within one year to the collector of the customs of Portland.

The agreed facts of the case are, that the knees in question were imported from Nova Scotia a few days before the reciprocity treaty with Great Britain went into operation, and entered in bond. Immediately after, they were exported to Nova Scotia under the act of Congress, March 3, 1845, there landed and duly entered at that custom-house. A short time after such entry and landing, they were taken on board the same vessel, brought to this port and duly offered for entry, being then duty-free under the treaty.

On the facts stated, it is evident that no deception was practiced or intended on the officers of the United States, and from all the circumstances, we may believe that no hardship by commencing a suit on the bond was intended to the defendants. The facts present a naked question of law, whether goods entered from a foreign

country in bond, and duly exported, and all the requirements of the United States' laws complied with, may be again imported into the United States. These require them to be landed in a foreign port, and to pass through a foreign custom-house, and thus be mixed in the common mass of merchandise in that country.

Of the general question of right, it seems to me that no doubts can be entertained unless there be a statute expressly forbidding it. There is no general law of the United States prohibiting it, the United States have no interest in preventing it, nor do I see, if the property in a foreign country has gone into the general mass of consumable commodities, how it then is to be executed. When this merchandise is mixed by retail trade with the common mass, it carries with it from hand to hand, no ear-mark by which it is to be distinguished from other merchandise of the same character.

But it is agreed on the part of the United States, that this is expressly forbidden in the law of 1845, which authorized this exportation. That act in its 9th section, provides, 'that no goods or merchandise exported according to the provisions of this act, shall be voluntarily landed or brought into the United States,' and on being so, every person concerned in the act shall be liable to a penalty of $400. The language of this statute is express, and if no qualification of it is to be admitted, I do not see how this case is to be extracted from it.

Whether the act complained of in this suit is prohibited by this act, depends on the meaning of these words—no goods. These, in their ordinary sense, include all goods, and this is the sense in which they must be received, provided in a just interpretation of the act a narrower meaning ought not to be admitted. After some reflection on the subject, I have come to the conclusion that they are used in this act in a more restricted sense. When goods entered in debenture are reëxported, have passed through a foreign custom-house, are landed and have gone into the general mass of property, and like that, subject to be consumed, and bought and sold by retail, they are no longer in the sense of this statute the

same goods. They have become foreign goods and are liable, like any other merchandise, to be imported again into this country. It is admitted that this is rather a strained meaning of the words, but it is consonant to the general policy of all debenture laws, and to the whole policy of our government on this subject.

All drawbacks have their foundation mainly on one principle, that of favoring the carrying trade. To engage in this requires no outlay of capital beyond furnishing the vehicle in which the goods are carried, and a large part of the profit of transportation is for the payment of labor. Besides this consideration, every nation that has considerable trade has an interest in training up to the labor of the seas a hardy and brave race of men for their naval service. So intimately connected with national prowess and defence is this, that all nations, inhabiting the sea coast with a share of trade, have, in a greater or less degree, encouraged their poorer and more laborious population to engage in the fisheries, by which, they are inured to the dangers and anxieties of this element, by relieving that trade of all unnecessary burdens, as well as by direct bounties.

When the products of foreign countries are imported for the purpose of being consumed in this country, they are burthened with duties, which are remitted on reëxportation, or so much is retained only as is necessary to pay the expense of landing and re-delivering them. The whole protective policy of the government is to prevent their being re-landed furtively and going into the consumption of the country. When this is effected, the whole of the general object of the government is satisfied.

That such is the policy of this government, is, I think, sufficiently proved by our whole legislation on this subject. Our country early went into the policy of favoring the carrying trade, and the general system of drawbacks on reëxportation was carefully digested in the general revenue act of 1799, sects. 75–82. (Statutes at Large, vol. 1, 680, etc.) The whole object of this law, so far as it is protective, is to prevent goods thus reëxported, from being brought

back and going into the consumption of the country. In the construction of all laws, this general policy ought to be kept in view.

In the interpretation of all arbitrary laws, and those granting drawbacks are eminently such, the whole system is to be taken together; the general object to be obtained; and when the policy is apparent, if there be in the law itself, or in any subsequent regulation words of doubtful or ambiguous meaning, this is the key to unlock them; because the legislature can never, by particular regulation, be desirous of counteracting their general policy. Even in the plainest language, courts have sometimes come to the conclusion, that the legislators have said, but did not mean what they apparently did. But when such terms are used that they are not to be mistaken, we have nothing to do but to carry the law into execution, for the courts are not the ultimate judges of the policy of the law.

But all, or almost any language may be ambiguous or doubtful, and may be more or less, in its sense, restrained or extended by the circumstances in which it is used, by the intent of the law, and the general object which the legislature had in view. This is an imperfection in all terms that express moral or metaphysical ideas, and necessarily arises from the fact that these ideas are in their nature, a little vague. There is not, as in mathematical definitions, any archetype in nature to which they can be compared, but they lie with a little uncertainty in every mind. My opinion is, that, however express and general the words of the statute are, we may be justified in confining their sense, and that these goods, when they have been entered a foreign custom-house, and landed, have entered into the general mass of merchandise, are no longer, in a mercantile sense, the same goods.

The result is that the suit must be dismissed, but as the words of the statute are express, no costs will be given.

Shepley, District Attorney for the United States.

Rand, for respondent.

THE JOHN C. BROOKS.

A vessel, arriving from a foreign port, is forfeited by landing goods without a permit from the collector after her arrival in the port of discharge.

May, 1861. This case involved a question of law only.

WARE, *District Judge.*

This is a libel *in rem* for a forfeiture under the 50th section of the collection act of 1799. The schooner John C. Brooks, of about 200 tons burthen, from Cardenas, in the island of Cuba, arrived at Portland on the thirtieth of March last, and, on that day, without a permit from the collector, landed 21,000 cigars at Simonton's Cove, in Cape Elizabeth. The smuggling is proved and is not denied on the part of the claimant, the master, having been indicted, pleaded *nolo contendere* to the facts alleged in this libel. And for the same act the United States claim a forfeiture of the vessel. To this, as working a forfeiture of the vessel, the claimant objects, and supports his objections, both on principle, that is the true construction of this act, and on authority.

The forfeiture is alleged to have occurred under the 50th section of the collection act of 1799. By this it is provided, that if any goods shall be unladen within the United States, from a vessel arriving from a foreign port, without a permit from the collectors of the port, that there shall be a personal penalty on the master, and if the value of the goods thus landed shall amount to $400 or over, there shall be in addition, a forfeiture of the vessel in which they are brought. The act in this case is within the words of the statute. To extract this case from the express language of the statute, it must be shown that while the legislature said one thing they meant another. This, though not gratuitously

to be supposed, may be shown; but it is incumbent on him who alleges an exception to prove it. To this the claimant says that the forfeiture in this section ought, in reason and justice, to be confined to unlading within a port, and that this unlading was before the vessel arrived in a port. This fact is asserted on one side and denied on the other, but whether it was within or without the port, and what are the particular boundaries of a port I shall not at present inquire. In support of this limitation, and that it may be fairly inferred from the whole act, the claimant quotes the 27th section. This provides for a landing before the vessel arrives at her port of discharge, and while she is, if I may so say, havening on the coast for that purpose, and enacts a different penalty on the master and with no forfeiture of the vessel into which such goods are unladen. The consequences will be, if this section is to be literally enforced, that two penalties of different sums are to be inflicted on the master, and in one case, for the same identical act, there will be a forfeiture of the vessel and in the other not. The legislature, it is argued, must have made a distinction in their minds though it is not noticed in their language, between an unlading before and after her arrival in her port of discharge.

It must be admitted that there is not merely ingenuity in this argument. Should there be two penalties for the same act, or should there be a forfeiture of the vessel in one case and no forfeiture in another? Admitting the power of the legislature, this is not to be presumed unless indicated by the elearest terms. It seems to me that the objection presents a real difficulty, especially in a statute drawn with so much care, that after more than sixty year's experience, it remains on the statute book as the principal collection law. Penalties and forfeitures may be limited by construction on good and sufficient reasons, but never by such means are to be multiplied. But where the legislature has clearly expressed their will, courts have no other duty but to obey. If this question were to be now settled on principle, what is the true construction of the law, there would be good reason to hesitate before coming to a conclusion one way or the other.

But the very case presented by this libel has, on two different occasions, been before the Circuit Court of the United States of different districts. The first was in 1806 before Judge Washington, in New Jersey, in the case of the Hunter, 1 Peters, C. C. R. 10. In this the learned judge decided, that a vessel was not forfeited by unlading without a permit before she arrives at her port of destination, and that the words of the 50th section, though comprehensive enough to include such a case, ought to be confined by construction to an unlading after her arrival within a port, as that of unlading out of her port of destination was specially provided for in the 27th section. And to this conclusion he was brought after a careful review of the whole act. Six years after, a case involving the same question came before Judge Story of this Circuit, in the Industry, 1 Gall. 114, and he decided after a like careful examination of the statute, that a landing in any port of the United States, after a vessel's arriving in her port of destination, did draw after it a forfeiture of the vessel. Both these cases were fully argued, and the same considerations which have been pressed in the present case were urged there, and the eminent judges came to precisely opposite conclusions. These conflicting decisions on the same question and on the same arguments are sufficient to show that it is not without intrinsic difficulties. The one admits the power of the legislature, but holds the statute, from its apparent uncertainty, subject to interpretation, the other is in obedience to the words of the law. While it is conceded that the argument has weight, it is not admitted that it can exempt the case from the direct language of the law. This is not only the latest decision, but one in this Circuit, and this, in ordinary cases, makes the law of the Circuit, until it is reversed by the highest Court of Appeal. In the present case there must be declared a forfeiture.

Shepley, District Attorney for the United States.

Butler, for respondent.

UNITED STATES *vs.* THE WILLIAM ARTHUR.

A blockade, as that word is understood by the law of nations, is an investment of a town of one belligerent by the forces of another.

Every nation of common rights may declare what shall be ports of entry and delivery, and participate in trade by law, and enforce their laws by such means and penalties as she pleases. If she places armed ships before them, this does not constitute a blockade, as understood by public law, but is a mere municipal regulation, though familiarly called a blockade.

A neutral or, neutrality, always implies three parties, two billigerents and a third, a common friend, all acknowledged as independent nations. But in a civil war there is only one party, insurgents are not acknowledged as a nation, but to foreigners they are mere malefactors.

The laws of the United States, of July 13th, and Aug. 6th, 1861, are purely municipal regulations, with which foreigners have no concern.

Where an intent is charged in a statute as constituting part of a crime, it must be proved as a fact.

The words aid, abet, and promote, used in the law of Aug. 6, 1861, are words of uncertain meaning, as to their intent, and in this law are to be taken in their largest extent.

October, 1861.

WARE, *Judge.*

The facts in these cases are, in substance, as follows:

John Douglass Merrilees, the claimant, was born in Aberdeen, in Scotland, in allegiance to the crown of Great Britain, which he has never renounced, but for the last fifteen months preceding the seizure, has resided in Wilmington, N. C. He there had his place of business, and there his family resided. On the 7th of August last, he purchased, in Portland, a schooner called the 'Sarah Ann Roe,' since called the 'William Arthur,' for the sum of $3000, and took out for her a temporary register, from the British Consul, in this place, as a British vessel.

Merrilees proceeded to load her with about one fourth or fifth of a cargo, and on the 23d of the month, cleared and sailed for the island of St. Thomas and a market; on the same day, as she was

sailing out of port, she was seized by the collector. A libel was filed claiming a forfeiture of both vessel and cargo, under the late act of Congress, of Aug. 6, 1861, chap. 60, called the confiscation act. Subsequently another libel was filed, claiming a forfeiture under the act of July 13, 1861, chap. 3, prohibiting all commercial intercourse between the loyal and revolted States. The ground of the seizure was that St. Thomas was only her ostensible, but that Wilmington was her real and secret port of destination.

An argument is raised *in limine*, that one of these libels is fatal to the other. I do not feel the force of this argument. The same act may be a violation of both laws, and if so, the vessel may be liable under both or either. Such a cumulation of forfeitures is not unfrequent in the revenue laws, and one law was never supposed to repeal or make void the other. If so, there may be a libel under either or both. There may be a difference in the distribution of the proceeds of the forfeiture, if the vessel is condemned, but in this the claimant has no interest and no voice.

The first question presented in this case is, did the 'William Arthur' sail from this port on a voyage to St. Thomas according to her clearance, or did she, under cover of that, secretly sail on a voyage to Wilmington. The one was a legal voyage, the other was, or at least might be, under either libel, an unlawful voyage.

To prove that the former was intended and was the true object of her destination, her clearance and all the usual and regular documents are produced and the sworn answer of the claimant that the vessel and cargo were purchased with that intent and purpose.

This is sufficient *prima facie* evidence, and throws on the government the burthen of proving, to countervail it, the truth of their allegations, that though the vessel sailed ostensibly on a legal voyage, she in her secret intention sailed on an illegal voyage and to a prohibited port. This the attorney for the United States has endeavored to do, partly from circumstantial and partly by direct evidence, and this lies partly in written and partly in verbal testimony.

The vessel was purchased on the 7th of August last. Merrilees had then to provide her a master and crew. He went himself as master, and as it appears, had, previous to the purchase of a vessel, engaged J. F. Miller Derickson as sailing master to any one he should purchase, and left it to him to procure a crew. On the third day of August, four days before the purchase of a vessel, Derickson, the sailing master, wrote to Godfrey, born in Maryland, but then in New York, to engage him as mate. In this letter he directs him to bring with him a chart of the coast from Portland to Saint Augustine, and where to get it, if he had not one, and he would pay for it; to let no one see his letter, but burn it, and to direct to him at the United States Hotel, by the name of James F. Miller, and requests him to answer soon. Receiving no answer, he wrote again on the 7th, referring to his former letter, and requests him to answer as soon as he gets it, whether he will come without failing; directs him to call on G. E. A. Baker, to whose care his former letter was directed, where he will 'see all,' and to direct his answer to Jas. F. Miller. On the same day he wrote a third letter after he got an answer to his first, with a caution to let none of his letters be seen; directs him to stop at the Elm House, and not at the United States, to avoid suspicion, tells him his wages will be forty dollars a month, sends him twenty-five dollars and informs him that twenty-five more will be paid by Merrilees when he arrives in Portland, and urges haste. In all his letters Derickson gives no account of the voyage, but in his last, says that it is not a privateering enterprise. These letters have been verified by Derickson.

To this written evidence the attorney has added the parol testimony of Godfrey, who was mate of a vessel, and informer. He was a native of Maryland, but had sailed out of New York for eight or ten years, and came to Portland for the first time about four weeks ago, on the invitation of Derickson, whom he knew from his boyhood, they having been brought up near together. He signed Mariner's articles to go in the Wm. Arthur, Derickson met

him on the steps of the Elm House, whither he had gone to avoid suspicion, and then informed him that the voyage so mysteriously concealed in the letters was to Wilmington, North Carolina, but that they should take in part of a cargo and clear for St. Thomas. That at Wilmington they should take a cargo of naval stores and proceed to Nova Scotia.

Derickson several times said that the blockade amounted to nothing, and was of no account. The same evening Derickson introduced him at the United States Hotel to Merrilees, and he apparently treating him (Godfrey) as a confidential man, informed him that the real voyage contemplated was to Wilmington. The witness does not remember that Merrilees ever named St. Thomas in connection with the voyage. Though in his cross-examination he is not certain that the destination of the vessel was first mentioned by Merrilees that evening, he adheres firmly and steadily through all his examination to this assertion, that he was informed of the destination of the voyage by Merrilees as well as by Derickson.

This direct evidence is also confirmed by Hallowell, the hack-driver, who heard Merrilees say at the Ocean House, in Cape Elizabeth, that he came from Dixie land and was bound there, that he had bought a vessel at Portland, and was afraid it would be taken from him by the Yankees, and that Merrilees left the room cursing the abolitionists.

If, with the confirmatory testimony of Hallowell, Godfrey is to be believed, the intended voyage to Wilmington is proved. If such a voyage was intended, it of course would be masked under one that was legal. The claimant apparently feels this, and a regular attempt is made to break down the credibility of this witness. Nothing is offered against his general character for truth, but Derickson is offered to contradict him in the main fact. Derickson says that he never, at any time told Godfrey that a voyage to Wilmington was intended. Two witnesses, one of whom is Derickson, also swear that after the seizure, Godfrey said that Merrilees had better give him $500 or $1000, to abscond and not appear as a wit-

ness in the case. Godfrey, on his reëxamination, declares that he never said so. This is the amount of the discrediting testimony. It all rests on a *vive voce* examination and the credibility of witnesses. Against this verbal testimony we have the letters written by Derickson preparatory to the voyage, and engaging Godfrey for it. These cannot deceive by falsehood. In these letters why does Derickson begin by changing his name, thus bearing a speaking falsehood on his forehead? Men do not act without a motive, and if they have nothing else to hide they never conceal their names. Why does he, to avoid suspicion, tell him to come to the Elm House, and not to the United States Hotel, if there was nothing that he wished to keep out of sight? Why, when it seems the voyage was already determined on, when his letters contain liberal pecuniary offers, does he offer but one word of explanation, that this is not a privateering enterprise. It seems to me that a man must be not only gravel blind but stone blind, not to see that here was a secret expedition intended, and that the direction to bring with him a chart of the coast from Portland to St. Augustine, points directly to a voyage somewhere in 'Dixie land' that is in the slave or rebellious States.

Before considering the laws applicable to these cases, as they present questions both novel and important, as well as in deference to the learned and able arguments on one side and the other, something perhaps ought to be said by the court, on the law of blockade and the rights of neutrals.

The United States as an independent nation, has a right to declare what places shall be ports of entry and delivery, and confine all maritime trade to them. This they may do of common right as a mere municipal regulation, and no foreign nation may interfere in the subject. They may enforce such regulations by such means and with such penalties as they please. If before the places not privileged as ports of entry or delivery, or of foreign and coasting trade in order to enforce this regulation, they choose to place armed vessels, this does not constitute a blockade in the language

of the law of nations. The right of the United States to establish the embargo of 1808, indefinite as to time as it was, and closing all the ports of the country, was never questioned by foreign powers. To such an arrangement, the term blockade does not apply. That only exists where the forces of one nation encompass the ports of another. A third nation then standing by, which takes no part in the war, has certain rights of communication and trade which are allowed by the billigerents. A blockade interrupts this trade and communication. When it is a question whether a nation, or an individual of that nation, has violated that blockade, or whether this is real or only nominal, a question of law or fact may arise, which will be decided by the law of blockade. But in this case only our own ports are shut.

A neutral or neutrality, always supposes three parties, two nations, each having an organized government, acknowledged by other nations, and a third, a common friend of both. This third has certain rights allowed by the belligerents, and if these are violated in respect to the nation or an individual, redress may be claimed under the law of nations. But in the present case, there is but one party known to international law, one party whose existence is acknowledged by all nations, viz.: the United States. There is indeed here an insurrection. But insurgents do not, in international law, constitute a party having the rights of a nation. Foreign nations do not acknowledge them. Towards them they are simply violators of the laws, and are legally entitled to no more rights than other criminals. In the law of nations they are only malefactors.

If Guernsey or Jersey, or any of the channel islands, much more if Yorkshire or Lancashire, which form part of the main land of the British Empire, should abrogate all the laws of England, and set themselves up as an independent nation, would England consider them as having equal rights with herself, or as revolted subjects, guilty of the crime of treason, the highest crime known to her laws, and punished with the highest penalty? If a high functionary of

another nation should acknowledge an equality, and offer to treat them as an independent nation, having the same rights in the commonwealth of nations as herself, especially if this was done immediately and in hot haste, would she consider this a doubtful or equivocal act, or as taking part with a revolted province? Let her own acts in the war of 1776 with this country answer this question. We at that time formed a part of the British Empire and commenced a civil war to resist intolerable grievances, not so much in the amount of the grievances as in the principles advanced. France, with sharp eyes, looked on, and in the course of three years, so says the British Cabinet, 'formed connections, first secret and afterwards avowed, with the revolted colonies of America, and according to the acknowledged law of nations these connections may be regarded as a breach of the peace between the two crowns, and as a declaration of war on the part of the most christian king.'*

This declaration emanated from the British Cabinet, of which Lords Thurlow and Loughborough constituted a part, and clearly shew that in her understanding of the laws of nations, that revolted subjects are not acknowledged as a nation under that law, I think correctly. The practice of nations I know is not in all cases in harmony with the law. Rome extended her empire not by just war, as we now understand it, but by seeking on all occasions to take part with the minority against the majority, and finally reducing both to slavery, and perhaps some may think that England has followed the same policy in the East. But this I believe to be the law of the Christian world in the West. Believing this, the rights of blockade and neutrality have no application in these cases. The laws of July 13th, and of August 6th, are purely municipal regulations; as such I shall treat them. It is true that, in this country, an insurrection exists *de facto*, and upon its issue may depend the

*Response a la Expose de la Cour de France, written by Gibbon in French, for circulation on the continent of Europe. Gibbon's Miscellanies, vol. 3, page 295, and vol. 1, page 156. This answer was generally admired for the terseness of the style and the solidity of the argument, and was attributed at the time to Lord Stermont.

question whether North America will be one nation or be cut up into many. If we continue one, we shall give law not only to the continent and its adjacent waters, but shall have an equal, if not a controlling voice in giving maritime laws to the two great oceans that border upon us, and this may be a reason why the nations of Europe may look upon what is going on in America with more than common interest, and even with fear and jealousy. But the magnitude of the interests depending cannot alter the law.

On the evidence before detailed somewhat at length, the attorney for the United States has filed a libel under the act of August 6th, 1861, chap. 60, for a forfeiture of the vessel and cargo.

The act is entitled, 'An act to confiscate property used for insurrectionary purposes.' In the operative words of the first section, it is provided that when 'the laws of the United States are opposed by combinations of men too powerful to be suppressed in the ordinary modes, if any person shall purchase or acquire, sell or give any property of whatsoever kind or description with intent to use or employ the same, or suffer the same to be used or employed in aiding, abetting, or promoting such insurrection or resistance to the laws, or any person engaged therein; or if any person or persons being the owner or owners of such property shall knowingly use or employ, or consent to the use or employment of the same as aforesaid, all such property' is declared subject to seizure as prize, and as such will be subject to forfeiture for the uses declared in the act.

If I understand the testimony in this case right, this vessel was intended for Wilmington, North Carolina, one of the places where the laws of the United States are opposed, and their execution obstructed by combinations too powerful to be suppressed by the ordinary means employed for that purpose. Merrilees, the claimant, was the owner of that property, both vessel and cargo. Some evidence was offered to show that one Blossom, of Wilmington, was the real owner, and Merrilees was a mere man of straw, and ostensible owner only. But the evidence is, I think, insufficient, and for the purposes of this trial, Merrilees must be considered as the

real owner. And whether intended to be used in aiding, abetting, and promoting the insurrection is the only question which is open in the libel.

Merrilees, the claimant, was born in the dominions of the crown of Great Britain, and owes to that a natural allegiance. He there has his domicil of origin, but has acquired a commercial one in Wilmington. A commercial easily gives place to a natural domicil, and it has been argued that where one has been acquired, the first movement of a party to put off his acquired and resume his domicil of birth, the natural one takes the place of one which is purely artificial. It is said that Merrilees had taken such steps, and that his rights, if they may be affected, are to be considered as those of a neutral. But without repeating what has been before said on the subject of neutrality, it may be remarked, that Merrilees had acquired a commercial domicil at Wilmington, that the vessel was purchased and loaded before he left the country, that the evidence of an intention of change of domicil is insufficient, and that he is to be treated as an American. If questions of neutrality arise in this case, he could have no advantage from them.

The intention of a person can only be known from his declarations and acts. In the want of declarations, every one is presumed in law, as well as in common sense, to intend what will be the natural consequence of his acts.

The legal intention, therefore, must have been that the vessel was to go to Wilmington, and there sell her cargo, consisting of consumable articles, and, as this is not proved to be a garrisoned town or place of arms, to have gone into the consumption of that place and the vicinity, and that the vessel herself was to go into any trade which was there offered, unless we take the specific evidence, that she was to take a cargo of naval stores for Nova Scotia. This is the intention which the law would impute.

The only question raised as to the intention, is whether sending goods of this nature into a vicinage included in the insurrection was intended within the meaning of the law to aid, abet, and promote the prevailing insurrection.

These words to aid, abet, and promote, are of cognate significance, and like all words of a general nature, are of large and somewhat indefinite meaning. They may be used in a stringent or restricted sense, and not only admit but require interpretation. When this is the case, we in the first place look to the law itself, to learn in what sense they are used. But this contains no word of particular limitation or general description to enlarge or restrict their scope. For a second rule, if the law is founded on the relations of things themselves, in other words, on the law of God, and is calculated merely to enforce the law of nature, and contains words of ambiguous or indefinite import, which require interpretation, we recur to the laws of nature, to the rules and precepts of natural equity to explain them. But if the law is purely arbitrary, if it does not command or prohibit what is right or wrong, in itself, intrinsically, but is so only under particular circumstances, we look to the will of the legislature itself, which is the sole judge of the expediency of suspending the laws of nations in this particular case. No other department of government has a right to interpose its judgment in this matter, and particularly the judiciary has not. Its simple duty is to explain the law, if necessary, and execute it according to the will of the legislature. This is a plain and obvious rule, and besides its intrinsic reasonableness, is confirmed by the wisdom and moderation of the Sage Domat.—[Lois civilis, Liv. Preliminaire, Tit. 1, sec. 3.]

To come within the law, an intent must be shown, for this is a substantive part of the law—and as before remarked, there is no evidence on this record that Wilmington was a besieged, blockaded, or garrisoned town, or that there was any assemblage there to oppose the execution of the laws of the United States. The cargo was, therefore, intended there to be sold, and to go into the consumption of that town and that vicinity. Was this to aid, assist, and promote the insurrection? The attorney of the United States must defend the affirmative of the proposition, for the intent, as before observed, is a substantive part of the law. It was not the pur-

pose of the law to interfere with private charity, or acts of beneficence, and if supplies, of whatever kind, were sent to meet the wants of a relative or friend, it is not prohibited by the law. This is the interpretation which is natural and will be generally given.

If the legislature have made use of general terms, which require interpretation, and have used no words in the law itself, which will aid us in this, the first rule is that we must look into laws in *pari materia* for their interpretation, especially if these laws are recent. 2d—To the mischiefs intended to be overcome or prevented, or the good to be obtained, or 3d, we may look at the surrounding circumstances of historical notoriety, for without the aid of particular testimony the court is supposed to know these.

1. In recurring to laws in *pari materia*, the first law which occurs, is that of July 13th, 1861, passed at the same session of Congress, and very shortly before this. By this law all commercial intercourse between the loyal and the insurgent States is prohibited. If we are to take this as an indication of the meaning of the legislature, we should be inclined to take these words in the largest extent. The general character of the laws passed at this session, and particularly the large grants of men and money for carrying on hostilities, lead to the same conclusion. All laws relating to the same subject-matter would dispose us to give to these words the natural, and not a restrictive meaning.

2. The second medium of interpretation is the mischief to be suppressed, or the good to be obtained, for every law ought naturally to be interpreted so that the object of it should be accomplished and not defeated. The object of this law is to put an end to the insurrection. And this insurrection is against all the laws of the United States, and not one only. The insurgents deny the whole authority of the United States. They deny the rightful power of the government itself. The struggle is not then *pro aris et foris*, to have possession of them, but whether we shall have altars and hearths to contend for. When insurgents have thrown off all laws and all authority of government, they are not scrupulous as to the

means of executing their purpose. They avail themselves of any means in their power which will serve their turn, and those who oppose them must draw the sword and throw away the scabbard. What made even legitimate wars in ancient times so fierce and bloody? It was because the combatants knew that they were fighting not only for national independence, but for everything valuable that personally belonged to themselves, for their hearths and homes, for their wives and children, for their own liberty. Everything was spoils for the victors. The insurgents have no public treasury to go to to pay their followers. They pay only in promises, and their purpose must be that the conquered shall redeem these promises. The rich harvest of Philadelphia, New York, and Boston, would go far towards this. So the fillibusters, or buccaneers, as we are informed, being without resources of their own, promised their followers to reward them with the plunder and plantations of Cuba. In such case it is always *vae victis* woe to the conquered.

Nor did the legislature rely on the superiority of wealth or men in the loyal States. They had learned that William of Normandy, with 60,000 adventurers, subdued the whole of England, seized the wealth of the inhabitants, enriched his followers, and reduced the whole people to slavery. Three or four hundred years were hardly sufficient to raise the Saxons to the condition of free cultivators, and the nobility coming from the Norman law still continued a privilege class. In war, and especially in civil war, boldness and audacity is very apt to be successful. In civil war insurgents seize on every opportunity that God and nature put in their way to make advantage of it. If a legitimate government will not do something of the same kind, the people must take the consequences. Congress, after pouring all the resources of the country into the lap of the executive, both of men and money have shown a disposition to apply all legitimate means to put down the insurrection. The confiscation acts operating on the field where the insurgents recruit their armies, is a part of the means to curb and put an end to this insurrection, and the mischief which the law was intended

to meet would not lead us to curtail it of any of its efficiency. It would rather tend to give those words their largest meaning.

3. A third mode of explaining law which is of doubtful meaning, is the surrounding circumstances. These which may be known by all, may by the court, without special evidence to prove them. The insurgent States raise for export, large quantities of cotton, less tobacco, and some rice and sugar. None of these, especially the first two, are food or drink, and of the last two the export is not great. But of provisions they seldom raise enough for their consumption, and of manufactures they have scarcely any. The deficiency of these supplies must be severely felt, and the obvious object of this act is not only to cut off the supplies of munitions of war for men in arms, but of necessaries for the people at large.

On the common and well established principles and rules of construing restrictive laws, I can see no reason for taking these words, to aid, abet, and promote, in a limited sense. All the reasons gathered from laws in *pari materia*, from the evils to be corrected by the operation of the law and historical circumstances, lead to giving them their fair and legitimate scope, and I do not feel authorized to affix a limitation to their meaning, when the legislature have given none. If words are to be taken in their natural and ordinary sense, condemnation of the vessel and cargo under this libel follows as a necessity.

A second libel has been filed against this vessel, founded on the acts of July 13, 1861. This act prohibits all commercial intercourse between the loyal and revolted States fifteen days after the President has issued his proclamation declaring that an insurrection exists. The President's proclamation bears date Aug. 16, and this seizure was made on the 23d of that month. It is drawn on the assumption that the 6th section does not limit the 5th, but the former goes into immediate operation. But as I condemn the vessel under the first libel this makes an examination of the cause of forfeiture under the 25th section unnecessary.

Talbot, District Attorney for the United States.

Shepley, for respondent.

THE ECHO.

Collision. Vessel condemned on the facts for want of sufficient ground tackle.

November, 1861.

WARE, *District Judge.*

A collision took place in Portland harbor between the Echo, a fishing schooner of about 54 tons burthen, on the night of Nov. 2, and the Nettle. Neither vessel had a man on board at the time of the accident. The Nettle, which was used as a pilot boat, was safely moored at her usual anchorage and fitted with everything requisite for her employment. In the course of the trial no fault has been found with this vessel. She remained in her place and was sunk by the Echo, where she was anchored, and she is acquitted of all blame.

The Echo was a fishing schooner, and arrived from a trip of the shore fishery Friday about 8 o'clock in the evening. She had a crew of four men and a boy, and these all remained on board from Friday evening until Saturday at three o'clock P. M. Then the weather being theatening they let go an additional anchor and all went ashore. The crew dispersed to their several places of residence, and the master, Wallace, a young man, at eight o'clock Saturday evening left his residence for the purpose of going on board the vessel and remaining through the night. But such at that time was the state of the weather, that, though he made the attempt, he was unable to succeed in getting on board, and after making fruitless attempts to get assistance, he could find no one who was willing to trust himself in the boat, and finally gave up the attempt. He remained on the wharf until 11 o'clock and

then went to his house. He returned as soon as it was light the next morning. In the meantime the Echo had dragged her anchor and the mischief was done.

The first fault found with the Echo is, that she was left through the night with no one aboard. But it was proved at the trial, that in this port it is customary to leave fishing vessels at anchor over night without a man on board. Some masters, of more than ordinary vigilance, may have at all times some one aboard to look after and take care of the vessel; but in good weather this is not the general custom. But this custom extends to, and can only be justified in ordinary weather, and at this time a storm had commenced and the elements were threatening. A more than ordinary care was therefore required. But this vessel was not finally abandoned. The master only left it temporarily for his supper, intending to return on board himself and to remain. He returned about eight o'clock, but in the mean time the wind had increased and he was unable to reach it. I am satisfied from the evidence, that Wallace acted in good faith when he left the Echo and when he attempted to return, and was only prevented by the elements; and that he made every exertion that could reasonably be expected. In my opinion his leaving for the short time, though the weather was in a critical state, was not a great fault on his part, not such an one that all the misfortune of the night ought to be borne by him.

He stated very plainly in his examination, that if he had been aboard he should have given more scope to the anchors; and that they had not more is one of the complaints against this vessel. Though the evidence on this subject is somewhat contradictory, as to the sufficiency of the scope, I am satisfied, that if more had been given, the vessel would have rode out the storm with more safety and ease. But the real question in this case is not what ought to be given for the purpose of encountering one of the severest gales we ever have, but whether it was sufficient for the time the master intended to be absent. The cables were measured

after the gale, and one had eighteen fathom and a fraction and one had twenty-one. This, though the weather was threatening, was, I think, sufficient for the time the master intended to be absent. If the master could be justified in leaving for a short time, I think he could also be justified in leaving the anchors as they were.

This brings us to the last complaint which has been made against this vessel, the original insufficiency of the ground tackle, and on this I have found more difficulty in coming to a satisfactory conclusion, than on any other. The weight of anchors for a vessel employed in the fisheries, according to her tonnage, is not precisely determined. But, on two points, there seems to be a general agreement confirmed by practice and experience. The first is, that the ground tackle for a fishing vessel need not be so heavy as for a vessel of like tonnage employed in the coasting trade. In the latter, from whatever cause it may be, vessels have heavier anchors and a longer scope to their cables. The second is, that there is now commonly used, in even fishing vessels, a heavier ground tackle than formerly. Experience has taught those who are engaged in this branch of industry, that they began their trade with too light anchors and they have gradually increased their weight.

The Echo was a schooner of 54 tons burthen, and it seems to be agreed that for a sheet anchor to a vessel of that tonnage, 200 pounds weight is the smallest that is allowed, and a somewhat lighter one for a second anchor, to be used in ordinary weather. And accordingly, the whole current of testimony, on the part of the claimant, has been to bring up the weight to that amount, the smallest that experience would allow for a vessel of that tonnage. But we have the account of Mr. Thurston who sold that anchor for the vessel, and at the time it was not a new, but a second-hand one. It was not weighed but was estimated and sold for 170 pounds. This agrees very nearly with the estimated weight from an imperfect weighing after the accident took place, that being 169 pounds. The second anchor, which was sufficient for ordinary weather, by usage as well as reason, might be a little lighter.

This was also imperfectly weighed after the accident, with the wooden stock and the end of the cable that held it, and they, together, weighed 165 pounds. It would be a liberal estimate that would bring this up to 180 pounds. The whole weight of her anchors would be but about 300 pounds. Now, according to the whole testimony in the case, for a vessel of this tonnage the anchors, together, ought to weigh nearly 400 pounds. My opinion is, therefore, that the ground tackle of the Echo was too light, being nearly one quarter lighter than that allowed by usage for such a vessel, and that she was in fault for not being sufficiently provided for such a gale.

I am not insensible that it is the duty of every one, according to his abilities and opportunities, especially in this part of the country, to encourage the fisheries. Fishermen are a most useful and meritorious class of men. They furnish those who have more easy means of living, a luxury in peace, and to all an ornament and safeguard in war. They follow an occupation full of danger and hardships, and they follow it for a sparing profit. It is an old remark of political economists, that employments like fishing and hunting, that are pursued, for the pleasurable excitement they afford, by persons in easy circumstances, are the hardest of any for those who are destined to gain their living by them. Their labor and sufferings are greatest, and their gains are smallest. The government patronizes them by an exclusive privilege of salt bounty in their favor. But with this they are obliged to practice the utmost economy, and to indulge themselves in the fewest luxuries. It cannot be a matter of surprise, though it may be of regret, that in fitting out a fishing vessel, this economy should be not only pushed to the greatest extreme, but sometimes beyond what can be allowed by law.

Whatever standard that has affixed, such is human nature, and, it may be added, human necessity, that at times it will be passed. When so, while those bound only by the common obligation of

humanity, may pardon the transgressor, courts of law are hardly excusable in departing from what usage and reason have prescribed as the rule for this case.

It is with some regret that I pronounce for the condemnation of the Echo in this case. But I do it without costs.

Fox, for libellant.

O'Donnell, for claimant.

THE R. P. CHASE.

When two libels are filed where one only is required, costs only in one are allowed. U. S. Laws, vol. 3, p. 19.

1861.

WARE, *District Judge.*

Two libels were filed against this vessel for wages, the first by Waterman, who entered as cook and steward, April 5th, 1860, and served in that capacity at $20 per month until May 20th. At that time he was promoted to that of mate, and served as such until Oct. 4th, 1860. The other by Cunningham, one of the crew, who shipped Aug. 5, 1860, and served to Oct. 1st, at $16 per month. The proof of their time of service, though not entirely regular, is satisfactory. For the service of Waterman, as mate, there was no agreed price; but that at which it is charged, $30 per month, is not unreasonable and ought to be allowed. The vessel was taken on shares by the master, Capt. Cunningham, he to be at the charge of victualling and manning, and personally answerable to the crew for their wages. But if they were not paid, the men had an undoubted right to look to the vessel. Both the libellants were of unexceptionable character, according to the testimony much above that of ordinary seamen. They did their duty faithfully, and, even if the ship earned nothing for the owners, were entitled to their hire. But it appears, that during their service she was eminently successful. The master being unable to pay them they have resorted to this mode. All fair deductions have been made, and I allow them wages according to the balance.

To Waterman, $103.90.

To Cunningham, $25.73.

But the principal controversy which arises on these cases, is on

a motion with respect to costs. Two libels have been filed when only one can be admitted. This is not the fault of the men. It arose entirely from the act of counsel, and that had its origin in the ignorance of the law, and the practice of the court. Though the counsel are without personal blame, and even without any intention of increasing costs, the law must be executed. By the act of 1790, c. 20, § 6, seamen are required to join in a libel. What was, by the practice of the court, a mere indulgence, is raised to a positive duty, and by the process act of 1813, U. S. Laws, vol. 3, p. 19, where more than one libel is filed when one only is necessary, costs shall be taxed only on one, and by the order o the court such cases may be ordered to be consolidated. The effect of a consolidation is, that all evidence, relating to a question in which all are interested, shall be taken only once, and be used with respect to all the parties embraced in the libel; but when this is decided the case of each party becomes an independent case and is contested on its own evidence.

The costs of one libel only and one seizure are to be taxed on that of Waterman. All the evidence bearing on the general question, in which both libellants are equally interested, are to be taxed on his libel. All the witnesses which were used in support of his libel are to be taxed in that, and all that were exclusively for the support of Cunningham's libel, are to be taxed according to the fee bill.

Jewett, for libellant.

Dana, for respondent.

THE JASPER.

Wages allowed on the facts.

Intemperance, if it wholly disqualifies a seaman from performing his duties, is a forfeiture of all wages, but if occasional only, it is marked by a deduction of wages according to circumstances, or by the courts entirely overlooked.

April, 1862.

WARE, *District Judge.*

This is a proceeding *in rem* for seamen's wages. Call, the libellant, has united with a claim for wages, one for other services, during seventeen days on one occasion, and twenty-two days on another, arising before the period in which he claims wages. These relate to a care of the vessel when she was undergoing some repairs or when she was blocked up by ice. At that time he was master and took the vessel on shares, he to have a certain portion of the earnings, to victual and man her, and the owners to keep her in repair. His relation to the vessel, the nature of the services, and the evidence offered in support of them, all conspire to induce me to lay these claims out of the case. If he has any title to pay for these services, it may more equitably be adjusted in another action pending on this subject in another tribunal. In this case I consider only his claim for wages.

The statute of the United States of 1790, suspending process against the vessel for ten days after the voyage is ended and the delivery of the cargo, if there were no other objections to the defence, does not apply to a case of this kind. The law itself is not of easy construction, and the courts have varied much in the interpretation of its meaning.

Three-eighths of this vessel were originally bought by the proceeds of a farm, given to Call's wife, with an understanding that he

was to go in her as master, and in this capacity he entered on board Sept. 29, 1858, and continued as master till May 21, 1859. At that time, either because some of the part owners became dissatisfied with him, or because he, being in embarrassed circumstances, was fearful that the freight due to him would be seized by his creditors, the papers of the vessel were indorsed to Hamlin, who was a hand on board. This was at Bangor. From this time Hamlin signed the bills of lading and collected the freight, beginning at Bangor and Providence, where she was then bound. Call went in her as a hand from that time, as long as he continued in the vessel. No shipping articles were signed, and there was nothing in writing to prove the nature of the contract. Everything was left to the uncertainity of a verbal understanding, and even the rate at which Call was to be paid was not agreed.

The whole matter was left in that way that, unless there was the greatest good faith on both sides, a controversy would be likely to arise when the parties came to a final settlement. Whatever might have been the private understanding between the parties, Hamlin, after that change of the papers, became legally master and known as such to all who dealt with the vessel. Call was only a seaman whether he occupied the place of mate or only foremast hand.

His claim for wages, if any, commenced at that time, and depends on the character in which he went, whether as master or not. The record proof, certainly, about which there can be no dispute, is that he was not master. Hamlin's testimony has been taken by the owners, and from this it appears that he, himself, performed all the duties of master. He signed the bills of lading, collected the freight, paid the crew, and in all respects appeared as master to strangers. He indeed says, that he collected the freight as agent for Call, and paid it over to him. But all this was done verbally, and he has no written voucher to show to affect Call, neither for the freight paid over, nor for Call's wages. As Call signed no shipping paper, this is the least that is to be expected.

And even to this day Hamlin has had no settlement with the owners, nor do we know how he took the vessel, either on shares or for monthly wages. Even if he stood before the court as an unimpeachable witness, his testimony alone would be hardly sufficient to meet Call's claim for wages. But even the admissibility of that part of his testimony is, to say the least, very doubtful, as he would be personally liable for the wages. In such a case written proof of payment ought to be required. If he paid freight to Call, it is to be remembered that Call's wife was part owner, and, as such, entitled to a part of it, and cannot be allowed on the evidence offered in this case, as part payment of wages. These I allow from the time of the change of the papers, so long as Call served in the vessel, which, according to his statement in the libel, was to the 8th of October. As no particular sum was agreed upon, I allow them at $—— per month.

But to this charge the claimants set up a forfeiture on account of habitual intemperance. This is the besetting sin of seamen, and, if fully proved, is a just ground of forfeiture, because it disqualifies a man from performing his duty. But when the offence is only occasional, the courts have not been in the habit of inflicting the highest penalty. It may be marked only by diminished wages. Though the evidence proves that Call was not so prudent in the use of intoxicating drink as he ought to be, it entirely fails of proving him incapable of duty at any time when he was called on.

An offset is also offered of a sail furtively taken from the vessel. If it was originally taken *animo furandi* it was given up. What is the true value of this sail, is not to be determined from the evidence. Some of the witnesses say it was of greater and some of less value, varying singularly in their estimate. It was a square sail and not constantly used. In 1856 this sail was repaired as an old sail. It was of thin cotton duck and kept in use until 1859, about three years. I say this sail, for it has not been pretended that a new sail was provided, and it could not, at that time, have

been of any value except for paper. If five dollars are allowed for this, I think it enough.

Wages at $20 per month for four months and nine days,	$87.00
For the sail deduction,	5.00
	$92.00

Sewall, for libellants.

Dana, for respondents.

THE MAY FLOWER.

When goods are laden on board of a vessel, the master is bound by the contract to give a bill of lading of them. But a bill of lading, in its essence, only contains a receipt of the goods with a promise to carry and deliver them according to the terms of the contractor.

The price of the carriage and delivery is no essential part of the instrument, and is inserted merely for the convenience of the parties. If it is not agreed upon, or there is a misunderstanding between the parties on this point, the master is not obliged to give a bill of lading determining the freight.

August, 1863. The material facts of this case are stated in the opinion of the court.

WARE, *District Judge*.

Mr. Tiffany, a merchant of New York, wishing to ship a quantity of ice to New Orleans, for the purpose of obtaining a vessel for that use, visited the Kennebec and hired the lower hold of the May Flower, of Mr. Hagar, of Richmond. By the terms of the agreement, he was to have the whole of the lower hold but no other part of the ship. The freight which he was to pay for the exclusive use of that part of the vessel, is partially, but not fully agreed, and out of this difference of opinion the present controversy has arisen. The May Flower was a new ship, having never made a voyage. By the United States admeasurement, she measured 899 tons, but her real carrying capacity was supposed to be considerably greater. For the purpose of ascertaining nearly what that was, Mr. McCarting, an agent of Mr. Tiffany, together with Mr. Hagar, was deputed to make a rough admeasurement of the vessel. They reported that she could carry, in the lower hold, 1,200 tons or more. On this report Mr. Tiffany agreed to pay $10,000 for the lower hold. So far is agreed by the parties. But it is alleged in the answer that the whole agreement was, that

$10,000, at least, as a gross sum, should be paid, but if the quantity actually laden should exceed that sum, calculated at $9.75 per ton, then for the use of that part of the ship, should be paid for every ton so laden at that rate, to wit, $9.75 per ton.

The ship completed her lading at Bath, where she took, including what was laden at Richmond, 1,233 tons. The agent of the shipper, Mr. McCarting, then demanded a bill of lading in the common form, hiring the freight at $10,000 a gross sum. This the master refused by the direction of Mr. Hagar, but offered one in conformity with the agreement as understood by him, fixing the freight at $9.75 per ton. It does not appear, from the evidence, that a bill in any other form than that in which the freight was determined was mentioned on either side.

On this state of the case a question was raised by the counsel for the claimant, whether he was bound to give any bill of lading, the bargain being merely for the transportation and delivery of the goods, and nothing was said in the contract of a bill of lading. The want of a decision on this point may be accounted for in different ways. One mode is, that the delivery of a bill of lading is so much a matter of course that no master has ever refused it when demanded, or has thought it worth the expense to contest the legality of the demand. But there must always be a first case, and the true question is, whether he was bound by law to deliver one.

My opinion is, that he was so bound. All contracts bind the parties according to their common intention, when that can be clearly ascertained, not that of one party or of the other, but of both; and this whether the intention is expressed by words or not. By a contract, generally, a party binds his heirs and personal representatives, though they are not commonly named, for he binds all his property for the performance of it. This addition is annexed by the law. But customs and usages may annex terms and conditions to a contract, as well as positive law, and even vary the meaning of words actually used. In the case of *Smith* v. *Wil-*

son, 3 B. and Ad. 722, custom was allowed to change the meaning of a word which has as definite a signification as any in the language. In that contract, which related to rabbits, one thousand was held, according to the common intention of the parties, to mean one hundred dozen or twelve hundred. And this decision is confirmed by others of a like character. This was a land contract, but mercantile contracts are almost always elliptical, leaving something to be understood which is not expressed, and custom and usage may add terms and conditions to a contract as well as law. Indeed, almost all our mercantile law is the mere adoption, by the courts, of the customs of merchants. Contracts or conventions, says *Domat Lois civiles*, Liv. 1, Tit. 1, § 3, No. 1, bind the parties, not only by their words, but to all which is demanded by the nature of the contract, by the law and by custom, unless these consequences are expressly excluded. When the owner agreed to carry the ice, he bound himself just as much to give a receipt for it, with a promise to deliver it in the usual terms, as he did to carry it. Such a receipt and promise is just as much expected by the master as the shipper. It is included, by the common understanding, in the general contract. My opinion, therefore, is, that a bill of lading to this effect, he was bound by the contract to give.

It is of the essence of a bill of lading, that it contains a receipt for the goods with a promise to carry and deliver them, for this the master promises, and it necessarily contains nothing more. But, for convenience, it is usual to insert also the sum to be paid for their carriage. And if this is agreed, as is usually the case, it may, very suitably, be inserted. But this instrument is commonly given after the goods are received and stowed. It is given by the master. And if the freight is either not agreed, which is certainly uncommon, or there is a misunderstanding on this point between the shipper and the master, or owner, what is to be done? The giving of a bill of lading is the master's own act. It is a very ancient document, probably as old as maritime trade, and highly respected. And though not conclusive between the owner of the goods and

the vessel, it is at least *prima facie* evidence, and if indorsed for a valuable consideration, it is conclusive between such purchasers and the ship owner or master. Parsons Maritime Law, vol. 5, c. 7, § 2. The master is not obliged to furnish evidence against himself, especially when the truth of this he does not admit. He was thus justified in refusing such a bill of lading, and he is then standing only for his legal right in refusing one, stating the freight at a higher rate than what he understood it. And such a bill only was demanded. It does not appear that one in any other form was mentioned or thought of by either party, and such an one the master was not bound to give.

The amount of the freight not being agreed upon between the parties, this might, perhaps, be determined by a libel for not giving a bill of lading framed for that purpose. But the libel is not framed with that view, and it may as well be determined in a libel for the freight, if the ship carries it in safety to its port of delivery. And as, by the contract, the freight is to be paid at New York and not New Orleans, it may be more conveniently settled there. In the mean time no wrong can be done, as the manifest shows the amount of ice laden. The libel is dismissed with costs.

Gilbert, for libellant.

Fox, for respondent.

THE ROCHAMBEAU.

The price of seamen's wages ought to be fixed according to the plain meaning of the parties, when that can be understood.

Seamen are a plain people and are not to be presumed to advert to refined distinctions of law when they are not alluded to in the terms of the contract, or mentioned when it was made.

1864. The facts in this case will sufficiently appear in the opinion of the court.

WARE, *Judge.*

Trecartin, the libellant, an American citizen at St. John, N. B., shipped on board the American ship Rochambeau, for a voyage to London and back, not to exceed nine months in time, at the rate of $25 per month, in the New Brunswick currency. She made that voyage in about three and a half months, and the time not being ended for which he shipped, the libellant continued in the vessel without signing new articles, or any new agreement as to terms, and from that port went another voyage to London, which was to terminate in the United States. The ship made her voyage to London, and from there went to the Mediterranean, visited Malta and different ports in Sicily, and returned to Portland, where she arrived and delivered a cargo of salt.

Payments were made from time to time on the voyage; at London and in various ports in the Mediterranean. There remained due at the end of the voyage, $154.38, and the only question now remaining between the parties, is whether this shall be paid in the currency of the United States, or in specie, which was the currency at St. John, where the voyage was begun.

The original contract was made in that place, and was to be satisfied in the currency of that country, which was one of specie. As the libellant continued in the ship after the expiration of this

contract, without any new agreement as to terms, it would naturally follow that he continued his services on the terms fixed by the old contract, and this would ordinarily be the legal effect. It appears that the parties so understood it, for all the partial payments made from time to time, in London and various ports in the Mediterranean, were made in specie. This, if not conclusive, goes far towards putting an interpretation on the contract by the parties. If the payments made during the voyage were made in specie, why should the balance remaining due at the end of the voyage, be paid differently? The place where the original contract was made, and the continuation of the service under that contract, as no new one was made, and the price paid, all go to confirm the opinion that a specie contract was only in the contemplation of the parties. When the intention of the parties can be plainly understood, the duty of the court is to enforce the contract according to that meaning, and this is the dictate as well of the technical rules of law, as of common sense, and this rule applies with all its force to mariner's contracts, who are a plain people, and their agreements ought not to be settled on refined distinctions which they never contemplated. This view of the subject puts out of the case all the ingenious arguments of the learned counsel, as to the operation of the *lex loci*, whether the wages should be according to the law of the place where the contract was made, or according to that where it terminated.

The decree in the case ought to be for a sum in the United States currency that would make the payment equal to specie. In the daily fluctuation of the price of gold under the influence of the laws of the country and the commercial speculation, it is difficult to say what that sum should be; but I have come to the conclusion that it is double the amount admitted to be due of $154, and make

it $308, it will be as near right as I can make it. Decree $308 and costs.

O'Donnell, for libellant.

Evans and Putnam, for respondent.

NOTE BY REPORTER.—This case was carried by appeal to the Circuit Court, where it was '*Held* there was no question of the relation of one currency to another involved in the case, the contract for wages being expressed in dollars and cents, and the payment to be made in this country, the plaintiff (libellant) could recover no more than the amount specified in the contract.'—2 Cliff. R. 465.

THE RADAMA.

When two vessels are approaching each other in opposite directions, one of which is free and the other close-hauled to the wind, the one free must take the responsibility of avoiding a collision, and the one close-hauled must keep her way.

But if the wind is equally free to both, or if both have it on their beam, each must turn to their own right.

September, 1864.

WARE, *District Judge.*

The schooner Montezuma, of about 100 tons burthen, sailed from Salem in the early part of January, 1864, Wheldon, master, with an assorted cargo valued at about $7,000, bound to Cayenne, a port of South America, and on the 11th of that month, between the hours of seven and eight o'clock in the evening of that day, she met the British barque Radama, in ballast, bound from New York to Salem, off the Nauset lights of Cape Cod. The two vessels were sailing in nearly, if not exactly opposite directions. The wind was about west, the barque close-hauled on the wind, and the schooner free. The night was clear, with nothing but the ordinary haze on the waters, and the barque showed two lights, and the schooner had probably one when the opposite vessel was first seen, but soon showed another. The schooner saw the barque first, but both saw an approaching vessel soon enough to avoid it, if proper precautions had been taken, but if both continued on their courses a collision would probably take place.

In this situation what were the respective duties of these vessels? The barque was close-hauled on the wind, the schooner was free, and each vessel of course knew the condition of the other in this respect, because the same wind was common to both. One of the first laws of the sea, sanctioned both by the customs of the water,

and confirmed by numerous judicial decisions, is that the ship which has the wind free must take on herself the trouble and care of keeping free from a collision, and the consequence is that the vessel close-hauled must keep her course. There can thus be no danger, and the reason of the rule is obvious. The vessel that is free can more easily change her direction. The rule is plain and clear, and the custom was established from motives of safety and convenience by those who are familiar with navigation. Where there is sea-room enough, there can be no difficulty in complying with it.

When two vessels meet, each having the wind equally free, that is, each having it on her beam, then a different rule applies. Each ship is to take her right, and if each takes her own right they will turn in opposite directions and of course there can be no danger. This is equally a law of the sea and was much insisted on in the defence. Parsons' Marit. law, vol. 1, 195–6, and note. But this rule does not apply to the case when one vessel is close-hauled and the other has the wind free. It may, according to circumstances, be applicable to vessels sailing in narrow seas or rivers, but not where there is ample sea-room.

In this case both deviated in the same way and they thus came in collision, and the damage was done. But I cannot hold the schooner blamable for acting in obedience to a well-known law, and a well-known custom. The loss must therefore fall on the barque, and there must be an inquiry to ascertain the amount of damage.

Butler, for libellant.

Rand, for respondent.

NOTE BY REPORTER.—The amount for which the decree was entered for libellant in this case, was nine hundred and eighty-seven dollars. On appeal by respondent, the decree of the District Court was affirmed with costs by the Circuit Court, at April term, 1866, 2 Cliff. R. 551.

THE JEANNIE CUSHMAN.

In collision cases the injured vessel is entitled to be put into as good condition as she was in before the injury, and no allowance, as in insurance cases, when new materials are used, is made for new instead of old.

Upon the question, whether demurrage should be allowed while the injured vessel is undergoing repairs, no certain and uniform rule is established.

January, 1865.

WARE, *Judge.*

The Wm. Nickels, a hermaphrodite brig of about 120 tons burthen, Ames, master, arrived at Bangor, in the Penobscot river, from Baltimore, Sept. 8th, 1865, laden with white oak timber. The timber was consigned to Mr. Tewksbury, who had a ship-yard opposite to Bangor on the Brewer side of the river. She came to anchor, as alleged in the libel, on the Brewer or eastern side of the stream, about opposite to Tewksbury's ship-yard on the flats, where at low tide there was only five feet of water, as near as she could go to the ship-yard until she was lightened by a partial discharge of her cargo, she then drawing ten feet of water. She was subsequently removed by Atwood, the stevedore employed to unload her, and anchored a little lower in the river, but still on the flats and not in the bed of the river. The unloading commenced on Friday the 8th, and was continued till Saturday evening. At this time, the Jeannie Cushman, from Boston, with a cargo of coal, arrived within three miles of Bangor, where she took a steam-tug to carry her into the harbor. The tug took her in tow and, in coming into the harbor, she came in collision with the Wm. Nickels, and the damage was done that is complained of in this libel.

The first question that arises in this case is, whether the Wm. Nickels was anchored and lay on lawful ground. The harbor reg-

ulations of Bangor, established by the city government, and authorized by the legislature of the State, provide that, 'no vessel, steamboat, or raft shall be allowed to anchor or lay in the channel of the river, between Bangor bridge and the north line of Hampden, in such a manner as to obstruct the free passage of vessels, boats, or rafts up and down the river or stream.' 'And if any vessel or raft shall anchor or lie contrary to any of these regulations, the harbor master shall forthwith give notice to the masters thereof, or the person having the care of the same to remove the same; and if the said notice is not complied with without delay, the harbor master shall make or cause the said removal at the expense of the said vessel, boat, or raft.'

On the question of the position where the Nickels anchored and lay, there is some variance in the testimony. It has been specially labored on both sides. On the eastern or Brewer side, the land from the shore, at high water, runs off shelving to the bed or channel of the river to a considerable distance. Part of the way the land is bare at low water, and part of it is covered, so that the bed of the river is close to the Bangor side, and the middle of the river is different at different times of the tide. Where the flats terminate they suddenly drop about four feet to the bed of the stream, which is rocky. On these flats and out of the bed of the river, she was placed by Atwood, and remained there, according to the libellants, until the collision, so that she was aground for a considerable time during low tide. Parker, the harbor master, and well acquainted with the river, saw her on Friday and Saturday, and considered her as lying in a safe and suitable place and did not order her to change her position, and, though he did not go on board of her, could easily determine whether she was in the way or would obstruct the safe navigation of the stream. He thought her in a safe place. His testimony is substantially confirmed by that of Atwood, the stevedore, who unloaded her, by that of Tewksbury, at whose ship-yard she discharged her cargo, and by that of Fifield.

To meet and overcome this proof, a large number of witnesses

have been examined on the part of the claimants. Without going over all their depositions in detail, it may be remarked generally, that they express their opinion that the Nickels lay in the channel of the river so as to obstruct the navigation of vessels coming into the harbor, and this opinion is formed from her position in the stream. But all agree that the bed of the river is on the Bangor side, and that there are no flats there, but the bed of the river comes up quite to the shore. The tide rises from twelve to seventeen feet, and flows considerably on the eastern shore, but more on the western or Bangor side, so that the centre of the stream will be farther from Bangor at high than at low water. She might be in the middle of the stream at high water and still on the Brewer flats. This testimony I do not think sufficient to overcome the positive testimony on the part of the libellants, of Atwood, who chose her position, and of Parker, the harbor master, who saw her Friday and Saturday, whose business it is to see the channel is kept free from obstructions, and who is very positive that she was placed in a proper manner, from the fact that she lay aground during three hours of low tide, which she would not in the bed of the stream. On a comparison of the whole testimony it is, I think, satisfactorily proved that the Wm. Nickels was on the Brewer flats and in a proper place for unlading. The collision must, therefore, be attributed to the Jeannie Cushman, and she be responsible. There may be, possibly, a question when a sailing vessel is in tow of a steam-tug and a collision occurs, whether the tug or the vessel is liable, but it does not arise in this case. The libel is against the vessel, and she is undoubtedly liable, whoever may direct her motions. The maritime law treats her as a person, and makes her answerable for all the damage she does. *U. S.* v. *The Brig Malek Adhel*, 1 How. 233–4.

The collision took place between eleven and twelve o'clock at night. The crew of the Nickels had part of them left her, so that at that time she had but two men in addition to the captain. These were all abed, but a light was suspended several feet above the

deck, and it was a moonlight night, the moon being two hours or more high, and clear star-light or only thin flying clouds. The Cushman, in ascending the river on the Bangor side, struck a scow and glanced from that against the starboard bow of the Nickels, and, in the collision, the two masts of the Nickels were broken and fell overboard, and some damage was done to her rigging. She was repaired at Tewksbury's wharf, and the bills are all rendered in and not objected to. Her repairs are taxed at ordinary prices, and have been paid to the amount of $630.55.

In collision cases the injured vessel is entitled to be put in as good a condition as she was in before the injury, and no allowance, as in insurance cases where new materials are used, is made for new instead of old. But, in this case, as the foremast, where it was broken, had been spliced, was old and evidently weak and rotten at that place, I think it proper that this should be deducted, and as the cost of both masts was $95, from this is deducted $47.50. The libellant also claims for demurrage while the vessel was under repair. On this subject the practice of the courts is curious; in some cases it is allowed and in others not. No certain and uniform rule is established. But it seems, in the present case, some allowance should be made, and is. I allow $62 to be added for this.

Decree for libellant for $645.05, damages and costs.

Rowe, for libellant.

A. A. Strout, *C. P. Stetson*, for respondent.

NOTE BY REPORTER.—This case was carried by appeal to the Circuit Court, where the decree of the District Court was affirmed, Sept. 3, 1866.

THE WILLIAM CAREY.

To render a sale valid, made by a master of a vessel under the general authority vested in him, and convey a good title under it, there must be a necessity for such sale, and entire good faith on the part of the master.

February, 1865.

WARE, *Judge.*

The William Carey, a British barque of about 580 tons burthen, Edward Williams, master, sailed from London in May, 1863, for New Zealand, with a general cargo, and passengers with their freight, and having delivered her cargo there, went to the Chincha Islands and took in a cargo of guano, which she delivered at Martinique in the West Indies. She then went to St. Thomas, and was there chartered by her master to go to St. John, New Brunswick, for a cargo of deal, which she was to deliver at Liverpool, England. She took in 300 tons of ballast, and sailed from St. Thomas Oct. 2d, 1864, and on the coast of Maine she first made the Island of Mount Desert Nov. 4th, at 6 o'clock in the morning, about fifteen miles distant, with a strong wind, increasing to a gale from the S.S.E., driving directly towards the island. She came to anchor near the Duck Islands, in about 19 fathoms water, and she let out 75 fathoms of chain. In about twenty minutes the port barrel of her windlass gave way under the strain of the wind, the cranks crooked, the wood-work broke, and it was entirely useless. After that broke she was made fast to the deck stoppers. She held for fifteen minutes, and then the cable parted at the 15th fathom shackle from the anchor. She then drifted towards Gott's Island, and when she was half way from Gott's Island to Bass Harbor Light, let go her starboard anchor and 55 fathoms of chain, which held her through the night. The next day, Sunday, the master went ashore for aid, and to get the windlass repaired. He got six

or seven men, who succeeded in heaving the cable and fixed the windlass, but it could not be used. The master then left with the mate, to obtain a pilot to bring the vessel into harbor. He succeeded in obtaining a pilot, but such was the state of the wind and weather that he could not get on board the vessel till the 10th. He then shipped the cable, and with Moor, the pilot, and Capt. Benson, steered into the harbor and anchored in four fathoms water, with a spare anchor of about 1200 lbs. The wind then blew a gale from the S.W. They let out fifty fathoms of cable, but the vessel drifted directly on shore on a ledge of rocks at full high water. She rested on the rocks at both ends and made water freely, as there was as much, or nearly so, inside as outside. The master got assistance the next tide, and endeavored to get her off in vain. He then went ashore to note his protest with a notary, and saw the wreck-master, Capt. Benson. The notary ordered a survey. Three surveyors were appointed, two masters of vessels, and one ship-carpenter. They reported after a careful examination, that she could not be got off the rocks, and recommended that she be sold the next day, at 4 o'clock P. M., where she lay. She was accordingly sold, and under this sale the claimants claim to hold the vessel. The counsel of His Brittanic Majesty acting officially for the benefit of the original owners, or whoever may claim title under them, disputes this title, and the captain's right to sell is the question now to be decided.

The legal authority of the master to sell a vessel under his care, as master, is too well settled in both English and American jurisprudence, to be controverted, and it has not been in this case. But to render a sale valid, and convey a good title under it, two circumstances must concur. There must be a necessity for a sale, and there must be entire good faith on the part of the master. In this case the necessity arises from the vessel being driven on the rocks in that harbor. It was a rocky shore where she struck, and to a considerable distance each way, and if she drove at the mercy of the winds she could not by any possibility avoid them. It is proved,

also, that other vessels had been wrecked on, or near where this went on the rocks, and that none had been saved.

The master, after making an unsuccessful attempt to get her afloat from the rocks the next tide, went ashore to note his protest, and get aid and advice. The notary advised a survey, and appointed three persons to make it, as competent and judicious as could be found in that place, two of which had been masters of vessels, and one a ship-carpenter. They went on board, and after a careful examination, reported that she was much damaged, bilged badly, hogged, strained, nearly full of water, and could not be removed from her present position. The surveyors lived in the neighborhood, were men well acquainted with the character of the shore where she lay, knew all the facilities, as well as difficulties of saving vessels in that place, as well as the hazards of the weather at that season of the year, and were men of as much experience, knowledge, and character, as any in the place. They examined the condition of the vessel, and gave their opinion under a feeling of responsibility, and to their conclusion much deference would naturally be shown. And their judgment agreed with that of the master. Under all the circumstances, they recommended the sale of the vessel where she lay, the next day, Saturday, at four o'clock P. M., and the master's opinion concurred with them.

After the survey on Saturday morning, the United States steamer Mahoning went into Bass Harbor, and the captain, with the chief engineer, Mr. Douglass, made a short visit to her. It is the duty of this vessel to aid others in distress. She is prepared for it, and it is the opinion of the chief engineer, that if the weather favored her, she could, with proper appliances, have been saved. But this was after the survey, the order of sale, and the advertisement, when the business was in the hands of the law, and the master chose to be influenced by that decision, by the opinions of discreet men before expressed concurring with his own, than in any uncertain opinion subsequently volunteered by others, and she was sold accordingly for $1000 in gold, or the equivalent, $2500 in curren-

cy. If any arguments may be drawn from subsequent facts, it may be observed that no attempt was made to get her off the rocks, but she was stripped where she lay at the time.

The necessity of a sale is, I think, made out by the evidence. But this is not alone sufficient. There must be entire good faith in the sale on the part of the master. He is appointed to navigate the vessel, and for that purpose he is the agent of the owners, and has all the powers that such an agency requires; but the agency to sell, the law rather casts on him in extreme cases, and it is his duty to obtain as much for her, and for the benefit of his owners, as he can.

The judgment or good faith of the master is questioned in this,—that sufficient time was not allowed to circulate the information more widely. The survey was made Friday, and the sale was ordered on Saturday, on the recommendation of the surveyors. Immediate notice was given of the sale by posting up advertisements in the three principal settlements of that town. But it is said that sufficient time was not given to spread the notices, and the population of Tremont was small. Still there were enough men of property in the place to create some competition, though perhaps not so great as would arise from a more extensive notoriety. At the same time the situation of the vessel was full of peril. She lay on the rocks, where she was driven from her mooring by the violence of the wind, and a heavy storm which was then threatening might make her completely a wreck. In these circumstances the master followed the opinions of the surveyors, and ordered a sale at that time.

Another circumstance is relied on in impeaching the master's good faith, that he did not order her to be sold in lots, but in the lump. On this point there is a difference of opinion among the witnesses, some thinking that she could sell better one way and some in the other. The master chose to sell her in the lump. There is room for this difference of opinion, and it would be a hard measure to attribute the determination of a doubtful matter to the want of integrity in the master.

But the heaviest charge against the good faith of the master is in the concealment of the time of sale from the officers of the Mahoning. They visited the vessel on the morning of the sale, after the time was fixed, and it was the duty of the master to give all the publicity to it that was possible. Yet he not only did not mention it, but took pains to conceal it, by pretending that the time was not determined, and assuring them that they should be informed. This fact, of which there could be no doubt, is left entirely unexplained by the testimony. I cannot explain it to my satisfaction. But on this fact alone, it would be a harsh judgment to blast the master's reputation perpetually.

A good deal has been said at the argument, of a general conspiracy at the sale to injure the owners or under-writers. Such rumors would naturally be set afloat, but as they are not supported by any evidence in the case, they may justly be dismissed, more especially as the case is subject to appeal, in which new evidence and any error may be corrected.

Libel dismissed with costs.

Shepley & Dana, for libellant.

Hale and S. C. Strout, for claimant.

NOTE BY REPORTER.—On appeal to the Circuit Court the decree of the District Court was affirmed, but without costs, at Sept. Term, 1865.

THE ALONZO.

The master has a right to disrate a seaman for incapacity, and in proper cases he will be justified in doing it.

But the seaman does not forfeit, necessarily, all claim for wages, but if he continues in the ship and is put to other duties, he shall be paid reasonable wages.

A seaman is justified in leaving a vessel for just fears for his personal safety.

July, 1865.

WARE, *Judge.*

The schooner Alonzo, of about 295 tons burthen, sailed from Cardiff, in Wales, in the early part of December, 1864, with a crew of ten men all told, that is, a master, two mates, a steward and cook, and six men before the mast, for Nassau in the West Indies (to any port in the West Indies), or any port of America, and to his final port of discharge in any part of the British Provinces in North America, the whole term not to exceed twelve months. Bush sailed in her as cook and steward at four pounds per month, wages, and joined the vessel on the 7th of December. On her passage out to the West Indies, the vessel had an unusually rough time. There was a constant succession of heavy winds, amounting often to gales and squalls. This kept the sea exceedingly rough, and the vessel being of small size, she of course partook of the motion of the water and was continually tossed in every direction, keeping everything on board in constant agitation, and sometimes shipping water to an inconvenient extent. Her sails were some of them rent and her hull strained so that she leaked considerably, and she was at this time short of provision, so that on the 5th of February, being then nearer Havana, and that port more accessible, she bore away for it and finally succeeded in reaching it in safety. After she had discharged her cargo and repaired dam-

age, she went to Tampico, back to the West Indies, and finally to Portland, where Bush left the vessel, and now sues for his wages.

On the 7th of January, about one month after she left Cardiff, Bush was disrated from the office of cook and steward for which he shipped, put out of the galley, and another person appointed in his place, and it appears from the master's account, that at Havana he applied to the British Consul, at that port, to dismiss him from the ship; but was informed that he must carry him on the voyage and not dismiss him but within the British provinces. During the whole voyage to Havana, after he was disrated, to Tampico, back to the West Indies and to Portland, where he finally left the vessel, Bush did, and was required to do, duty as a common seaman on board the vessel. He did not ship as a seaman and did not pretend to understand the duty of a seaman. Personally he was under size, weak, partially deformed, and incapable of the hard duties of a seaman. Accordingly he was put to various service. Sometimes he did duty as a seaman, sometimes worked in the galley and performed such service as he was put to, nor was there any complaint made that he did not usually do willingly what he was ordered to.

On the arrival of the vessel near Portland, he was told by the master that he must run away. The master, by his own account, was told by the British Consul, that he could not legally discharge him but in the British provinces. And this information was accompanied by threats of personal ill usage, even to that of taking his life if he continued in the vessel. This was done when two of the seamen were near enough to hear him, and their testimony fully confirms Bush's statement, and Bush solemnly declares that he was afraid to remain from an apprehension of what the master might do. Taking this order, with the threats with which it was accompanied, and the master's severity during the voyage, for he had been particularly severe to this man, and, on one occasion, was punished for a slight fault or, according to Bush, for none at all, with such severity that he did not get over it for two or three

weeks; with his habitual strictness, and great strength compared with the feebleness of Bush, it cannot be said that his fears were altogether groundless. The master says that this order to abandon the vessel was revoked, but he admits that it was given, and adds that he offered to pay his passage to St. John. Admitting it to be so, this would not diminish the fears of Bush, and the master well knew that, by deserting the ship, Bush would forfeit all claim to wages during the voyage.

Under all the circumstances, I think Bush had just cause for leaving the vessel and demanding his wages at this place. For one month, when he served as cook, I shall allow him, at the contract price, four pounds and for the residue of the time when he served as a seaman at three pounds. The master has an undoubted power of disrating a seaman. Every man engages for his own ability to do the duties for which he contracts. The master of the vessel is necessarily the judge of his competency in the first instance, but he decides, subject to have his decision reviewed by the proper authorities on shore. The master, without doubt, was dissatisfied with the cooking; at the same time it is true, according to all the proof, that while Bush was cook the weather was extremely tempestuous. The vessel being small had much motion, and the cook had hardly a fair opportunity of doing his business satisfactorily. But, allowing him to be disrated reasonably, there is no reason that he should not be paid for the actual service he performed in the ship during the residue of the voyage, while he remained in the vessel.

Decree for libellant accordingly.

G. F. Talbot, for libellant.

Drummond, for respondent.

NOTE BY REPORTER.—The decree in this case was affirmed by the Circuit Court on appeal, at April Term, 1866. 2 Cliff. R. 548.

THE PALLEDO.

The disobedience of a seaman is a very serious fault, and if persevered in is a forfeiture of all claim for wages.

If the master attempts to overcome the refusal of duty, he must be careful what means he employs. But the general conduct and behavior of the seamen may be fully inquired into.

July, 1865.

WARE, *Judge.*

In December last, the libellant shipped on board the Palledo, for a voyage from Portland to Matanzas and back to her port of discharge in the United States, and sailed on the 20th of that month. While on the outward voyage, on the 25th, at 4 o'clock P. M., when he was relieved from the wheel, he was ordered by the master to coil a hawser, which lay in the boat, to which order the libellant replied, 'that he thought he had been long enough on the deck, and that it was his watch below; that he had been on deck nearly all the night before, and every night before since he left Portland.' Capt. Marwick, and the mate, Leland, then seized him and threw him down on some lumber, and the master struck him two or three blows with his fist, and then ordered the mate to go to his cabin and bring a pistol, and ordered the mate several times to shoot him. Leland pointed the pistol at his abdomen, being three or four yards distant from him, and snapped it, but the cap only exploded without communicating fire to the charge. The master then ordered the mate to go to the cabin for another pistol, and while he was gone, he, the libellant, got into the rigging. The libellant then came down and took an axe, and told the master that if the pistol missed fire he would not miss his mark. That previous to this time he had offered no resistance and no disobedience to the master's orders. The answer admits the order, but adds

that the libellant utterly refused to obey it, with profane and insulting language, saying he would be damned if he did, and all the officers on board could not compel him to obey; that he then ordered the mate to go to the cabin for a pistol, but that it was known to him and all the officers that the pistol was not loaded, and that he ordered it merely for the sake of intimidating the man, and did not intend any personal injury, and he denied throwing him down or inflicting any blow.

The libel is brought to redress this injury, and a number of witnesses have been examined on one side and the other. In his answer, the master says, that to his knowledge, and that of all the officers, the pistol was not loaded, and brought up only for the purpose of intimidation, and this is, I think, satisfactorily supported by the evidence. I think the master had a right to do this, but it was certainly full of hazard, for if a pistol was used on this occasion, the natural presumption would be that it was loaded. It is only on clear and satisfactory proof that the contrary would be admitted.

When McCarty was ordered to coil the hawser, at the time when he was relieved from the wheel, it is clear from all the evidence that he refused. He does not deny it himself, but says he did it in a respectful manner, and with the excuse that he had been at work all the day, and most of the previous night, on deck, and this is partially supported by other evidence; on the other hand, it is testified that he answered in profane and disrespectful language, that he would be damned if he did, and all the officers could not make him. During the outward voyage they had rough weather, and all hands were pretty constantly at work, but it does not appear that McCarty was called on more than others, and that there was no peculiar hostility to him, that he was put to no harder service, or received worse treatment than the rest of the crew.

A deliberate refusal to do duty has always been considered as one of the highest offences by the maritime law. If persevered in it puts an end to all authority and order on board of the vessel, and

not only puts at hazard the ship, but the safety and lives of all on board. The power to command must reside somewhere, and the law has placed it in the master. He may exercise it properly, or harshly, and unjustly, and for this he is answerable, when he returns to port. But except in very peculiar cases, he must, at the time, be obeyed, and to enforce his orders the law gives him authority to use force. In the exercise of this, regard must be had to the occasion and to the circumstances of it, and especially to the character and conduct of the seamen. Evidence on this subject has been pretty largely gone into, and without going over it in detail, the result is by no means favorable to the libellant. On the contrary, the balance, by a strong preponderance, is, that he was an uncomfortable and troublesome man, that he was, if not a practiced pugilist, not unwilling to try himself in that way; that he had great confidence in his strength and skill, and that his manners and carriage were such as might be expected from such a person. All this was well known to the master, and was proved at the trial. If he was thrown down, the injury was not severe, and no permanent damage resulted. On the whole, my opinion is that the master acted with such moderation that he ought not to be answerable in damages.

The libel is dismissed, but without cost to either party.

Smith, for libellant.

Clifford, for respondent.

THE UNITED STATES *vs.* 39,150 CIGARS.

By the act of March 3d, 1863, § 1, the collector has no power to permit an entry of merchandise unaccompanied by an invoice, or a sufficient excuse for its absence, but it gives the Secretary of the Treasury that authority, and the same equitable power of remission, as in other cases.

By that act, when goods are refused an entry for want of an invoice, if the owner thereof attempts to procure an entry by any false and fraudulent practice or appliance whatever, the goods are forfeited.

February, 1866.

WARE, *Judge.*

This is a libel against 39,150 cigars, seized May 25th, 1864, on board the brig Gertrude, Chase, master, from Matanzas, in Cuba, to this port. It seems the custom-house officers, in Portland, were expecting this vessel about this time, and, in consequence of information communicated to them, were suspicious that cigars on board were intended to be smuggled from her. She was boarded, from the Cutter, in the night time, less than a mile from the light. The officer went on board of her and examined her manifest, and found five cases of cigars upon it, and found no others in the vessel and left her. But as there was no invoice or bill of lading they were seized. Two grounds of forfeiture are alleged in the libel, and are now relied on.

First, that there was no invoice to accompany the cigars, and that there was an attempt to procure an entry by a false and fraudulent practice and appliance. That there was no invoice on board the vessel is not disputed, and that goods cannot be entered without one, or a sufficient excuse for the absence of one, is certain. The collector has no power to permit such entry, but by the act of 1863, March 3d, § 1, the Secretary of Treasury may authorize an entry on such terms, and in accordance with such regulations,

general and special, as he may prescribe. Mr. Knowlton was at Matanzas when the cigars were put on board the Gertrude, and about that time returned to this country, but not in that vessel. Finding, on his return, the cigars not admitted to an entry, but seized, he applied to the collector to admit them, and offered his excuse for want of an invoice. The collector told him that he had no power to permit an entry, but that he must apply to the Secretary of the Treasury. Notwithstanding this answer, he persevered in his attempt to persuade the collector to permit an entry, and, for this attempt, a forfeiture of the goods is claimed.

By the act of March 3, 1863, § 1, when goods are refused an entry for want of an invoice, if the owner of the goods attempts to procure an entry by any false and fraudulent practice or appliance whatever, the goods are forfeited, but it gives to the Secretary of the Treasury the power to allow an entry, and the same equitable power of remission, as in other cases. This attempt to induce the collector to permit an entry, after the claimant knew he had not the power, is claimed as working a forfeiture of the goods, and, I think, justly. The words of the statute are very general and comprehensive, and seem to have been selected with a view to prohibit every attempt, by any means whatever, to affect an entry except by an application to the Secretary, for any attempt must be fraudulent towards the United States.

A second ground of forfeiture, alleged in the libel, and relied on at the hearing, is that they were not entered on such a manifest as is required by the act of March 2, 1799, § 24, the general collection law which has been in force and in constant use from the time that it was passed. The cigars were entered on a manifest deliverable to order, but it is plain that it was not a manifest containing all the particulars required by that law, and it was scarcely contended at the argument that it was.

But the goods were on board the vessel without a bill of lading or an invoice, which alone would awaken very lively suspicions. According to the decision in 2 Curtis, 434, in such a case, as to

cigars they must be deemed consigned to the master, though entered as consigned to a particular person, much more when entered as consigned to order generally. But, besides, the entry on the manifest is suspicious on its face. It appears in a different ink from the general entry on the manifest, and seems to have been entered at a different time, and was so testified to by experts. If consigned to the master they are forfeited by that act.

There is a considerable amount of testimony taken in this case, with reference to what took place in the island of Cuba, both by the United States and the claimant, in the first instance to prove or render probable, a premeditated design to smuggle the cigars, and in the second place, to account for the want of a bill of lading and invoice for the cigars, from the circumstances under which the claimant became the owner of them. This testimony is, in some respect, contradictory. I have thought it unnecessary particularly to examine it, as I think there was a forfeiture under the count stated. It could not avail the claimant, even on his interpretation of it, except in an equitable view, and these considerations are addressed to another department and not to the court, and when fairly considered it leaves the claimant under a cloud of suspicion not very favorable to his claim. Decree of forfeiture.

G. F. Talbot, District Attorney, for libellant.

Butler, for claimant.

APPENDIX.

APPENDIX.

RETIREMENT OF JUDGE WARE.

The members of the Cumberland Bar met by invitation at the United States Court Room, in Portland, on Wednesday the 23d day of May, 1866, to determine what expression of their esteem and respect for Judge WARE would be appropriate to the occasion of his retirement from the Bench of the District Court of the United States, a position which he had resigned after a judicial service of more than forty-four years. Hon. Thomas A. Deblois, Hon. George Evans, and District Attorney Geo. F. Talbot, were appointed a committee to prepare resolutions expressive of the sentiments of the bar on the occasion.

At an adjourned meeting, Mr. Talbot, from this committee, presented the following resolutions, which were unanimously adopted:

Resolved, That the members of Cumberland Bar, ask leave, on the occasion of the retirement of Judge Ware from the Bench of the District Court of the United States, to express their high appreciation of the important labors and studies, by which, through his long career of judicial service, the principles of maritime equity and international law have been established, and the interests of commerce have been secured and extended; and to signify their pride and satisfaction in the just eminence, which the pure style, the exhaustive learning, and the logical candor of his published opinions have gained for him among jurists throughout the world.

Resolved, That we shall ever cherish in grateful remembrance, the patience, impartiality, and courtesy, which have marked the official conduct of Judge Ware towards the members of the bar, and the amiable frankness and dignified simplicity, which in his intercourse with us individually, have formed the basis of the friendship and veneration in which he has long been held; and that we tender to him our cordial wishes that he may find in the retirement he has chosen as the appropriate close of his protracted labors, that calm satisfaction, which the retrospect of important service to his age and to the world, faithfully performed, cannot fail to give, and that peace of mind which flows out of a pure and blameless life.

It was then voted, that the resolutions be presented by the U. S. District Attorney to Judge WARE, at the coming in of the court on Thursday, May 31st, at 11 o'clock A. M., being the last day previous to that on which his resignation was to take effect, with such remarks as the Attorney might deem appropriate.

A few minutes after 11 o'clock the venerable Judge came in, and taking his seat upon the bench, the court was formally opened, the area assigned for the accommodation of the bar being filled with the members of the legal profession, anxious to participate in the official leave-taking. The District Attorney then came forward and read the resolutions, accompanying the presentation with the following address:

May it Please your Honor:

In presenting these resolutions in behalf of the Cumberland Bar, I perform a task at the same time sad and grateful. It is sad to be obliged to defer to that judgment of yours which has constrained you to terminate the pleasant official relations that have so long subsisted between the court and the legal profession practicing in it, and to feel that the bench you are about to vacate, will be de-

prived of the confidence and veneration your character has given it in the popular heart. But it is grateful to review your long career as a judge, paralleled by no other in judicial history, and to remember how its foundation was laid in thorough classical, historical, and legal study, how its progress has been *signal-marked* with the lights of jurisprudence, and how it has culminated in the eminence which has crowned your prolonged labors. It is grateful, too, to know that you have arrived at that goal which fitly divides labor from repose with natural vigor so little abated, that those tastes for intellectual investigation, which have been at the same time your employment and your diversion, have not lost their relish.

You took your seat upon the bench of this court very early in the independent existence of our State. Maine, by her seaboard position and the enterprise and hardihood of her people destined to become a commercial and maritime State, counts herself happy in having had you for so many years at the head of her maritime and admiralty court.

The people who have been the most resolute in attempting to subdue and control the sea, have from the earliest times dictated its laws. While powerful chiefs subjected to their sway such territories of the land as they could occupy and defend with their arms, the sovereignty of the ocean was for them who were bravest in defying its dangers. While on the northern coasts of the Mediterranean, and on the south shores of the Baltic and North seas, merchants were gathering wealth, and mariners finding exciting adventures, thoughtful minds were collecting and expanding those principles of natural equity, and those customs and usages to which traffic had learned to accommodate itself, which, still for the most part unenacted, form the body of the commercial law of the world.

As citizens of our State, we feel no more pride in the rank among commercial and maritime communities our merchants and ship-builders and seamen have won, than in the high repute your labors and studies have gained for you, in interpreting and developing the principles of maritime jurisprudence.

It was the pious surmise of the Psalmist, that 'They who go down to the sea in ships, and do business in great waters, see the works of the Lord and his wonders in the deep.' However these wonders may affect a refined and elevated spirit, it would seem as if the effect of the storms of the sea upon ordinary men was to arouse the storms of evil passion, and that the lawlessness of the open ocean begat in them a feeling that they had sailed beyond the constraints of human law, and crossed the line that bounds the jurisdiction of conscience and of God. Certain it is that the sea has been the theatre of some of the darkest deeds of which human nature is capable, and its unfathomed caves hold the secrets of the bloodiest cruelties ever perpetrated by man upon his kind. The early commerce, half traffic and half plunder, though it drew civilization in its train, was scarcely above the grade of statute piracy; nor could we believe, unless compelled by history,—looking at the quiet, civil, and decent social life of the thriving communities on the new continents and islands, in the massacres, enslavements, and extortions, that accompanied their discovery and colonization. Even now that necessarily despotic system of mastery, which places the persons and lives of unarmed seamen on shipboard under the custody of one doubly-armed man, whose ferocious passions may be stimulated by intoxication, sometimes brings back as freightage from far-off seas, horrors that afflict the human heart in the recital.

The ocean, that seems almost to defy its maker, the last of chaos to feel the coercion of creative order, has hitherto baffled man.—But every age it yields to his daring and inventive spirit. Long ago he found means to venture out upon its open wastes, using its currents and its very storms as propulsion for his travel and transportation. Within our time, in the steamboat, he has subjected it to forces more completely within his control, and defying its own. He is just about to span it with a line upon which his whispered messages shall make themselves heard beneath all its uproar from continent to continent.

Not less remarkable than these physical achievements, by which science and skill have made the sea docile to the uses of man, are

the moral agencies, which have carried the majesty and sanction of law to the loneliest waters of the most barbarous coasts. This law, w itten in part only in those axioms of natural equity which a large, liberal, and candid mind can read, it has been your province to explain, and to apply to the settlement of controversies, and that too, without aid from the deliberations of a jury. How justly and wisely you have done it, the confidence and respect of this commercial community, whose claims you have decided, and whose property has been controlled by your decrees, is ample testimonial. The shipmaster, in the port of a foreign land, has been made to feel that the charter-party defining the due compensation for his toil and risk, the interest of the ship in its proportion of the gains of commerce, and of the merchants in profits of his venture, would be enforced against his goods and his person upon his return from however prolonged a voyage. The sailor, the proper ward of the admiralty, has found in the humane patience, with which you have listened to the recital of his wrongs, his beatings, his tyings-up, his privations of food and wages, that your guardianship was something more than a maxim. And the coaster and adventurous landsman, who have braved the storms of our own rocky coast to rescue wrecked ships, wrecked goods, and periled lives, have been encouraged by your bounty to venture again upon a like beneficence.

We congratulate ourselves that your Reports, to be further enlarged, as we trust, by the publication of your manuscripts, will be enduring monuments of your humane feelings, your cultivated sense of justice, and your learning. I need not characterize in other terms than those used in the resolutions we have adopted, books quoted in all the Admiralty Courts of the world, and never but with deference and respect, and attractive to the general scholar by their perspicuous statements, their vivid style, and the cogency and conviction of their arguments. There is one obligation, however, I ought to acknowledge due from counsel for the uniform fullness and appreciative fairness, with which in your opinions you state, and the candor, with which you defer to, arguments of theirs,

which you found yourself compelled upon a closer analysis or a more comprehensive review to overrule.

Your powers as a Court have been large,—your responsibilities great. You lay them down, I apprehend, without a suspicion on the part of any man, however his fortunes may have fared at your hands, that those powers and responsibilities were ever abused, that a decision was ever rendered that did not reflect a delicate and elevated sentiment of justice, and that did not commend itself to the approbation of the public good sense.

But I must not recount further the obligations this bar and this entire community are under to you for the dignity of your example, and the honor you have conferred upon this high position, you are now to vacate, lest I give offence to that modesty, and those simple tastes of yours, that would repel extravagance as instinctively as insult.

Let me bid you only in an official sense an affectionate farewell, hoping that those habits of recreation and employment, you may find it more difficult to lay aside, than the dignity of your office, will continue to bring you daily to these precincts, that will long be haunted by the attractive and venerable influence of your presence and character.

Judge WARE was much affected by this expression of the feeling and appreciation of the bar, with which he had been so long connected, and with emotion only partially controlled, made the following response, all the bar coming forward and standing around the bench, and listening with reverent attention:—

Gentlemen of the Bar:

The expression on the part of the bar practicing in this court, wholly unsought for and unexpected on my part, deserves from me and is received with the deepest gratitude. It is a source of great gratification that the course of the court during the protracted period I have had the honor to sit in it, has received the approbation

of men learned in the law, who have been familiar with its practice, from whom nothing has been or could be concealed, and has called forth such an expression. In every case, one party or the other must be disappointed, in almost every instance of reasonable, and in some perhaps of just expectations, especially as the jurisdiction and practice of the court were in some degree uncertain and unsettled. In admiralty the prevailing opinion of the soundest and most learned jurisconsults of this country is that our courts have a larger jurisdiction than the High Court of Admiralty in England. Of course the English decisions, to which we habitually look as a safe guide, fail. The halting practice and the imperfect reports of our own court afford but an imperfect substitute. We are, therefore, left to find our way as well as we can by looking to general principles. When these are our only guide there will be of course different opinions. It cannot be expected that there will always be an entire agreement, and the most that can be hoped for is integrity of intention, and this, I trust, has never been doubted. To err is the common frailty of humanity, and I cannot too highly value the calmness with which these errors have been received, and the tenderness with which they have been handled.

The unvarying courtesy and kindness on the part of the bar which for so long a period has been uninterrupted, in full measure and beyond what would reasonably be expected, call imperiously for my grateful acknowledgments. They can never be forgotten by me, and will live as long as the pulsation of life lasts. It only remains, that with the best wishes for your happiness in this life and that which is to come, I bid you a final farewell.

At the close of the Judge's remarks the court adjourned.

PROCEEDINGS OF THE CUMBERLAND BAR

ON THE OCCASION OF THE DEATH OF

JUDGE ASHUR WARE,

WHICH OCCURRED SEPT. 10th, A. D. 1873.

The members of the Cumberland Bar Association met in the United States District Court room, at 3 o'clock on the 22d of September, 1873, agreeably to a previous notice, and Hon. Nathan Webb, the Vice President, in the absence of Judge Howard, the President, took the chair. M. M. Butler, Esq., on behalf of a committee appointed for that purpose at an earlier meeting, reported resolutions expressive of the sentiments of the Bar, in reference to Hon. Ashur Ware, for many years Judge of the United States District Court for Maine District, lately deceased, and the same were unanimously adopted.

At three and one-half o'clock, the court was announced, and Judge Fox took his place upon the bench. The court having been opened, Hon. George F. Talbot arose and spoke as follows:

May it Please your Honor:

Since its last session, the eminent man, whose personal virtues and judicial authority this court must always honor, has laid aside the burdens and infirmities of a protracted old age, and peacefully

passed on to test the mysteries of the life beyond. Judge Ware, who, for more than forty-four years, presided over the District Court of the United States for the State of Maine, in the seat to which you have so worthily succeeded, died peacefully at his residence in this city, on Wednesday, the 10th of September inst., at half-past eleven in the morning, in the ninety-second year of his age.

In announcing this event all sorrow and regret will be out of place. When a life endowed with rare physical and mental vigor, ennobled by worthy and patient labor, adorned and enriched by varied study and learning, dignified by simple and guileless manners, ends, there is no occasion to mourn or deplore. Its ending is rather the fit occasion to sum up and contemplate its excellences, and admire its rare good fortune. His fearless and adventurous spirit, long before it was weakened by the infirmities that oppressed and beclouded it, had frequently testified his satisfaction with the full measure of years allotted to him, and had come to look upon life without regret, and upon death as a problem that fascinated his curiosity and invited his experience. Those of us, who were permitted to look upon the calm face after death had composed it to the grand and beautiful expression which belonged to its maturity, who saw how, from the placid brow and composed countenance, all traces of feebleness and pain had passed away, could but think more kindly of that dread agent, which, seeming to crush all our hopes, leaves on the blank face, before it begins to decay, the gleam and promise of a better life, just as the sun, after it has set, gilds the clouds and sky with its continued light. While we accept trustfully such an omen of his fate, we find how it typifies a process of *apotheosis*, by which the bowed frame and the briefly clouded mind give place, in our memory and thought, to the dignified presence and clear and capacious intellect, strengthened and expanded by thought and learning, by which our revered friend will hereafter ever be remembered.

A life like Judge Ware's, so happily and nobly lived, so rich in substantial, if not conspicuous benefits conferred upon society, a

mind so well endowed with intellectual and moral culture, is of historic value, and deserves commemoration in a fitting biography. I know the fact, that he had been often urged to lay the proper foundation for such a work, by furnishing personal memoranda of the leading incidents of his life. Late in his old age he seems, partially, to have complied with such a request; but his life was a contemplative, rather than an active one, and, having few changes or events personal to himself to record, his unique and characteristic history, as told by himself, gives us only the processes by which his mind was trained, the relations which he recognized as connecting himself with God and the universe, and the growth of opinions, mainly theological, which his contemplation and study had compelled him to adopt. The proprieties of this occasion will allow me only to speak briefly of the work he has done in the world, and the traits of mental and moral excellence developed in doing it. He has given this description of his dominant mental passions:

'I had always a love of knowledge. This I believe was innate and instinctive. It had its origin in a natural curiosity, and was wholly independent of the consequences that flowed from it.'

He had a quiet contempt for the prevalent taste among his competitors in scholarship, whose efforts seemed to be stimulated by the desire to obtain honors, and who had more thirst for the reputation and rewards of learning than they had for learning itself. He says, moreover:

'My taste and inclination led me more to grave and solid studies, that improved the understanding, than to the lighter graces of polite letters. An important fact, or a principle which is a mere generalization of facts, had always more charms for me than a mere expression of happy elegance.'

To the shaping and strengthening of his mind, metaphysical studies largely contributed; in relation to this, he observes:

'Nothing contributes so much to sharpen the mind, and nothing to discover the weakness of an adverse argument on any subject, nothing to make nice distinctions and just discrimination, nothing

to detect as well as practice sophistry; to comprise the whole in one word, nothing so well teaches us the use of language, whether employed to express or, as it sometimes is, to conceal our meaning, as the study of metaphysics.'

But although he recognized the value of these studies as discipline, he complained that the knowledge they furnished was uncertain, and that the modern mind, after all its efforts, had been baffled by the same uncertainties and the same limitations that had arrested the researches of the ancient philosophers two thousand years ago. So he turned to mathematics as more attractive and solid ground, and in touching their fixed and certain data, laid his hand upon the laws and methods of the creation. To quote his own language:

'If there be any merit in the essays I have written, either miscellaneous or professional, or judicial opinions, in the selection and arrangement of the thought and matter, I have been more indebted to geometry than to all other studies. I think I may safely say this, when one of the greatest men ever bred in America, great at the bar, great on the bench, and great in political movements (though this was the less seen by the public), a man who would be, rather than seem great,—said that whatever merits his arguments at the bar might have had, they were all derived from Euclid; and juries, to whom these arguments were addressed, familiarly said of him that other advocates were plausible, but Parsons made a case plain and intelligible. I never studied a subject so well, or understood a science so thoroughly, as the elementary principles of geometry, and none of my juvenile studies had so deep and permanent an influence on my habits of mind.'

For a mind, whose leading characteristic is a love of knowledge, free of the ambition of distinction, and the meaner ambition of reward, strengthened by the severe and abstract processes of metaphysical and mathematical studies, one career naturally opens itself. It will seek truth—not in the department of man's material and animal life, but in those higher relations which subsist between man as a spirit, and the source from which he sprang, and the des-

tiny to which he is to attain. So we are not surprised to hear Judge Ware confess, that favoring influences aided the natural bent of his genius, to invite him to enter upon the study of theology, and devote his life to the office of preaching. From this project, however, he was deterred by the perhaps unexpected results to which he arrived, in turning his scientific and severe methods of investigation, to the prevalent religious beliefs of his time. These results he perhaps wisely concluded would be a too great innovation upon the cherished convictions of the religious mind of New England, to justify him in publicly proclaiming them. He had no taste for controversy. Notoriety only annoyed him. A wise skepticism, rather than a dogmatic and arrogant assurance, and a thorough respect for the genuine convictions of thinkers who honestly differed from him, compelled him to turn away from his favorite studies, and to use them ever afterwards as the recreations and solace of a life devoted to adjusting, upon far lower grounds, the controversies of men as to their natural rights and obligations. While these opinions of his may have well seemed heretical in the narrow prejudice which held New England sixty years ago, the expanded thought of later times have comprehended and embraced them within the limits of a christian charity and sympathy. For, after his severe and candid inquiry into the grounds of religious faith, his written confessions show that he held firmly to these conclusions; that the Universe proceeded from the hand of an intelligent Creator, who holds and governs it in the interests of justice and goodness; that man is amenable to the law of right, which is equivalent to the will of God, and is destined to an existence beyond his earthly life, where his condition will depend upon the fruits of virtue he has been able to gather from the good and evil influences, in the midst of which he had lived; and that Christianity, whose essence is the doctrine of the Fatherhood of God, and the equality of man, and whose highest sanction of virtue is furnished in its most clearly stated doctrine of a future life, if not a supernatural and miraculous revelation, is a historical and providential development of the progressive religious attainment of man, the best, as it is the last fruit of his religious aspirations.

Turning regretfully away from these high subjects, literature seemed naturally open to him; but sixty years ago literature was not recognized in our country as a profession. His mind had been trained to dwell only in realities, to seek for truth more than for beauty, and to grasp substance rather than form. He disclaimed for himself ideality and a strong poetic fancy, and so what he called the 'lighter and more ornamental graces of polite letters,' had no attractions for him. In this, too, he must be considered to have judged himself too severely, for that very fondness for precise and unequivocal statement, that orderly and logical method, that candid appreciation of all adverse argument, supplied by his metaphysical and mathematical studies, aided as they were by familiar converse with the models of classic oratory and poetry, laid the foundation for a style of expression eloquent in its simplicity and perspicuity. The vividness of his personal and historical sketches, the clearness and picturesqueness of statement in his judicial reports of the facts and incidents upon which he bases his judgment, and the charm of language which, in his private conversation, often arrested the attention even of uneducated persons, showed that he had mental qualities that would have rendered him conspicuous in literature.

So, steadily and without regret or misgiving, he turned his well-furnished mind to the study of law. An appointment, never more fittingly made, placed him upon the bench of this court, in a position that exempted him permanently from the cares of getting a livelihood, and preserved his pure and unsophisticated character from those intrigues and ambitions which work among our ablest public men such deplorable demoralization and deterioration. The field itself was sufficiently unpromising of anything but ease and obscurity. It was just the place for an indolent and superficial man to subside into routine and self assumption. What Judge Ware has done in this field, by putting genius and high intellect into his work, may now be seen in the published reports of his judgments,—important contributions to the splendid system of maritime jurisprudence, that regulates the commercial intercourse of civilized nations, and ever to be remembered as the best monuments of his fame.

The law of the sea, he was called upon to pronounce, must be as liberal and comprehensive as its own compass and extent. The common law, whose maxims had been derived from the feudal system, a highly artificial and aristocratic form of society, would never serve to regulate and restrict a commerce, inviting the freest competition among the most daring and adventurous, nor could the codes or legal principles derived from the consent or custom of a single people, accommodate themselves to the notions of rectitude and fair dealing, recognized by an international comity. It was left to the enlightened sense of justice, to determine the natural principles of law applicable to each case as it arose. Each court was put upon its conscience to pronounce a decree that should accord with the universally accredited sense of justice, or else it would nowhere be respected as the sentence of law. If local prejudice or patriotic feeling blinded its candor, it rightfully lost its authority.

At the time Judge Ware took his place upon the bench, the English precedents in admiralty were rare, and only partially applicable to this country, where we had given our Admiralty Courts a more liberal jurisdiction; and as to the precedents of other countries and treatises, though the work of men of great genius and learning, it must be remembered how soon they would become obsolete, by the expansion and transformation of commerce, through the discovery of new countries, the production of new materials, the invention of more powerful forces of propulsion, and the new commercial usages which would grow out of more frequent and rapid commercial intercommunication.

A capacious and well-poised mind to define, for new situations and new relations, the law of natural right, which should not only decide the case in controversy, but be an authority for like cases at home, and receive the respect and acquiescence of the courts of foreign nations, was what was required. For such an office, with such opportunities, the natural and acquired qualifications of Judge Ware were peculiarly adapted. The very taste that had inclined him to theological studies, made him a just and upright judge.

The pure and ethical ideas, by which he had regulated his own life, the keen moral sense that defined in his soul so sharply the boundary between right and wrong, gave him a power of moral perception, able to detect under most plausible disguises, every form of oppression and fraud. His metaphysical discipline enabled him to see the weakness of an adverse argument on any subject, to make nice distinctions and just discriminations, and to detect sophistry, and he had learned from geometry how to 'select and arrange,' in his judicial opinions, 'the thought and the matter.' When to this was added an elegance of style, derived from his classical and general reading, we can understand why the reports, which, when completed, will contain the judicial labors of his life, are everywhere held in such high estimation as authority by the courts, and as attractive to the professional and general scholar.

There was another mental trait which peculiarly fitted him to be the vindicator of the wrongs and oppressions of seamen. Few men have more heartily believed in the idea of the natural equality of men. He refused to assume any artificial dignity. It was with difficulty that he conformed to the prescribed etiquette and decorum of his own court. It offended his simple tastes to assume any badge or drapery, or to take a place in any procession. He liked to come quietly and unheralded, and take his seat in court, clothed only in the natural dignity of his own character and intellect; and if his seat was raised above the level of his friends, the officers of the court and members of the bar, the exclusion and elevation seemed a constant annoyance to him. This democratic feeling crops out everywhere in what he has written. His com ments upon history, though mainly dispassionate and critical, grow fervid with indignation at the oppressions and exactions which tyrants and rulers practiced upon the people; and his hearty attachment to Christianity seems largely due to its recognition of the brotherhood of man, and to the solace its high hopes offer to the sufferings and sorrows of the poor and down-trodden.

Assuming no artificial dignities for himself, he could not defer to any assumptions of rank among those to whom he dealt out jus-

tice. Different positions determined different scales of responsibility and duty, but these fairly considered, a man was a man, and below the rank and rights of a man he would never allow a human being to be placed, whatever might be his race or color, or however limited his intellect or education.

When at the end of a term of judicial service, rare in the annals of any people, and unprecedented in ours, he resigned his high office, this bar assembled in this court to express a just appreciation of the long official service he had so ably performed. We are now assembled when the long life itself, so successful and happy beyond the common lot, is rounded to a measure of years seldom allotted to man, to do honor to his character, and to give our testimony of his high worth, and to commend him, as an example of rare excellence, to the emulation of the generation of young men who are to succeed us. We may point to his, on the whole, happy old age, as a fit illustration of the noble language of Cicero:

'*Aptissima omnino sunt arma senectutis artes exercitationes—que virtutum, quæ in omni ætate cultæ, quum diu multumque vixeris munificos efferunt fructus, non solum quia numquam deserunt, ne extremo quidem tempore ætatis—quamquam id quidem maximum est —verum etiam quia conscientia bene actæ vitæ multorumque bene fac torum recordatio jucundissama est.*'

At the close of these remarks, M. M. Butler, Esq., rose to offer the resolutions of the bar, and said:

May it Please your Honor:

Accompanying the announcement, which has just been made, in so fitting terms, of the decease of Judge Ware, I have been deputed by the Bar Association of Cumberland County, to present to this Honorable Court over which he so long and so worthily presided, the resolutions which have been unanimously adopted in view of the occasion, expressive of our veneration of the man, and our appreciation of his virtues and public services.

In discharging the duty assigned me, naught indeed can be added, by any poor words of mine, to the beautiful tribute—alike

appreciative and discriminating—which has just been paid to his memory; naught certainly should be taken away therefrom.

I am sure that our brother Talbot has not, in any degree, overestimated the importance and influence of Judge Ware's judicial labors. The estimate which Judge Story put upon them, when he said that he regarded Judge Ware as one of the ablest and most learned, if not *the* ablest and most learned of the then living admiralty lawyers, was concurred in by the voice of contemporary assent, and has been confirmed by the later judgment of the Bar of this generation. Among the great lights, by which the paths of admiralty and maritime law have been illumined, his name will shine serene,—a star of the first magnitude. His recorded decisions, beautiful in structure, adorned with grace, and resting on the solid foundations of principle, have raised an enduring monument to his fame. His services in the cause of enlightened jurisprudence have already conferred, and will continue to confer, so long as justice shall be dispensed, lasting benefits on mankind.

The allusions to Judge Ware as a scholar have been most happy. It was certainly not alone in professional learning that his attainments were remarkable. He cultivated almost the whole boundless field of human knowledge—metaphysics—theology—polite literature—the classics—modern languages—the sciences—mathematics. He was scholarly in all his tastes and habits. He was one of those deep, quiet, unobtrusive students, of which our country has more in number, I believe, than we get credit for across the Atlantic.

Any review of the life of Judge Ware would be incomplete without reference to him as a citizen and member of society. His participation—so far as was befitting his position—in the business enterprises of our city, his connection with our educational interests, his selection, at different periods of his life, as President of two different banking institutions, and as director in another; his identification with the growth of the public improvements of the State, as early President of one of our leading railroad companies,

—these attest at once that Judge Ware was no recluse, and the confidence which was reposed in him by the community.

He ever took a lively interest in public affairs. In early life, before his elevation to the bench, he wielded a most trenchant pen in the discussion of the important political questions of the day, and afterwards throughout his judicial life, he never ceased to feel, and manifest on proper occasions, his deep interest in all that pertained to the welfare of his beloved country, the State of his adoption and the city of his home. He was a good citizen, a pure patriot, a genuine lover of liberty, a true Democrat, in the higher and nobler sense of the word.

But we, especially the older members of our number, who have been brought into more intimate relation with him, would hold in remembrance with enduring regard, Judge Ware, not alone as a great jurist, a ripe scholar, and good citizen, but as the modest, genial, true-hearted man that he was—possessing a tenderness of nature almost feminine,—a simplicity of character almost childlike. In our intercourse with him, none can recall an unkind act or a harsh word. No man had less occasion to repeat the beautiful prayer of the liturgy: 'From hatred, envy, and malice, and all uncharitableness, Good Lord deliver us.'

After having gone in and out before us in his Judicial career for more than forty years, having passed beyond the extreme limit allotted by the Scriptures to human existence—life's labors faithfully performed, his earthly tasks fully accomplished—this righteous judge, this great jurist, this pure-minded citizen, this excellent man has gone in fullness of time to his reward. Peace be with his ashes. May we not reverently inscribe over his grave:

'*Cujus est solum, ejus est usque ad cœlum.*'

May it please your Honor: I move that the resolutions to which I have referred, and which, with your Honor's permission, I will now read, may be received and entered upon the records of the Court.

Resolved, That we, the members of the Cumberland County Bar, deem the recent death of the Honorable Ashur Ware, for-

merly, and for more than two score years, Judge of the District Court of the United States for the District of Maine, an appropriate occasion for us, who enjoyed with him the kindliest and most friendly relations, both professional and personal, to pay our affectionate tribute of respect to his memory, and to testify our grateful appreciation of his virtues and public service.

Resolved, That the eminence of Judge Ware, in those branches of jurisprudence to which he devoted the labors of his life, has been so universally recognized, as not to need commemoration at our hands. But now that he has gone from us, we would fain give expression to our renewed sense of the importance and influence of his judicial labors, which have left so lasting an impression on the jurisprudence of his times, and our increased admiration of those luminous and erudite judgments, recorded in the reports which bear his name, which for sound learning, depth of research, logical acumen, felicity of illustration, and mastery of the English language, in a style of simple grace and beauty, are models of their kind in judicial literature, and have served no mere temporary purposes, but have become, to a great extent, the foundation of the practice and administration of admiralty and maritime law throughout the land, and precedents for future jurists forever.

Resolved, That, as members of the bar, we shall ever cherish in affectionate veneration the recollection of the modesty, simplicity, and courtesy that distinguished Judge Ware's social and official intercourse with us; of the cordial affability that was always ready to communicate to us his varied stores of thought and learning, and of the many virtues which endeared him to the community in which he lived.

Resolved, That a copy of these resolutions be communicated to the family of the deceased, and that the same be presented to the court over which he has so long presided, with a request that they be entered of record.

Hon. Nathan Webb, United States District Attorney, seconded the resolutions, and said:

May it Please your Honor:

In rising to second the resolutions of respect to the memory of Judge Ware, which have now been offered by the Cumberland Bar Association, I can not but feel regret that I never enjoyed to any considerable extent his personal acquaintance, and am consequently unable, out of my own experience, to add anything to the tribute of affection for the man, contained in this expression of the bar. On every side are met those, who for many years associated with him on terms of friendly intimacy. All unite in their testimony to the kindness of his nature, his purity and simplicity of character, his accurate scholarship and extensive and varied attainments. Companionship with him they esteem among their most valued opportunities.

Those of us, who knew him only in his judicial relations, recognize the fruits of those traits of character, and of his thorough and various culture in his official life and service.

Whoever studies the published opinions of Judge Ware will not fail to be impressed with the clearness of his intellectual perceptions, the precision and order of his statements, the rigor of his logic, the fullness of his research, the grace of his style, and his conscientious zeal to discern and to uphold truth and justice. Those opinions are widely known and valued: they have been known and valued, and held in ever increasing honor since they were promulgated.

It is not easy for us, who have pursued our researches in those branches of law in which he was so illustrious, to measure the sum of our obligation to his labors under the guidance of which we walk. Neither is the toil of those who have come after him, and walk in the paths he has cleared, to be compared with his task in making those paths plain and easy.

While he diligently devoted his powers to those pursuits appropriate to his position as a judge, he never lost his relish for the

studies of his earlier years, but throughout his long life, found leisure to gratify his love of literature and science. He ever turned with delight to the classics, of which, in his prime, he had been a critical student and an ardent lover. He did not, therefore, become indifferent to the interests of his own days, but was a constant and thoughtful observer of men and events, often with his pen giving important counsel and assistance in securing a wise direction to affairs.

Remembering him, and the history of his life, we may account him happy, as well in the number of his years, as in the experiences they brought, and for ourselves, to whom he was so long spared, and who have the benefit of his bright example, we may, as we turn to our duties, reverently say:

> 'Why weep we then for him, who having won
> The bound of man's appointed years, at last,
> Life's blessings all enjoyed, life's labors done,
> Serenely to his final rest has passed;
> While the soft memory of his virtues, yet
> Linger like twilight hues, when the bright sun is set.'

Hon. John Mussey, for many years Clerk of the Circuit and District Courts, while Judge Ware presided in the latter, arose, and with much feeling said:

May it please your Honor:

Having long known the distinguished jurist, whose recent decease is the occasion of this meeting of the brethren, it seems right that I should say a few words about one, with whom for a long period I was so intimately connected.

The high stand he occupied for many years as the exponent of maritime and admiralty law, is well known to you and the community at large.

When he took the bench of the United States District Court of Maine, in 1822, the rights and duties of seamen, the authority and responsibility of officers and owners of our merchant marine, were alike in great measure unknown and unrecognized by both the em-

ployers and employees. The clear head of the Judge soon evinced the determination and ability to bring order out of confusion and misconception. At first, many of his rulings clashed with the prejudices of owners and masters, but as case after case came before him, the mists of prejudice and shortsightedness lifted and dispersed. Soon those of the community interested looked up to him in confidence, that good common sense—a just appreciation of their needs, would be furnished by Judge Ware as opportunity offered, and they were not disappointed. The most violent opponents to his teachings gave way, and all felt, if they did not acknowledge the fact, that he was truly a public benefactor; that law as delivered by him was sound, reasonable, well-grounded, and would stand the severest scrutiny; and so it proved to be, by the voluntary acknowledgment of many eminent jurists in the Union. A few words of his social and home life. Modest and unobtrusive, he was ever ready to aid and encourage the efforts of the young practitioner in this court. No one, I think, ever left his chambers without being instructed and pleased. To myself, the recollections of the past are most grateful. His manner was always simple, unaffected, and childlike, and his heart full of the milk of human kindness. During a period of more than twenty-six years of official intimacy, never a hasty, cross, or angry word ruffled our friendship. A kinder or more constant friend and companion on the journey of life, I never had nor could desire to have. Such was Ashur Ware as he ever appeared to me.

The following is the response of Judge Fox:

Gentlemen of the Bar:

Judge Ware was appointed District Judge of Maine, in February, 1822, and he continued in the discharge of the duties of the office, until the spring of 1866, his resignation taking effect in May, I believe, being then compelled by the infirmities of years to withdraw from this place which he had, by his learning and ability so ably filled for more than forty-four years. Although eight years

have not elapsed since his retirement, I think a large proportion of the members of the bar now present, never enjoyed the satisfaction of practicing in the court whilst he here presided, and many of those who were then with us, distinguished in their high professional positions, have since passed away from us. The remembrance of the Fessendens, Evans, Deblois, Barnes, and others, is still vivid with many of us, and at last, this good old Judge, so endeared to all who ever held personal intercourse with him, has gone to his reward, after years of feebleness and suffering, and it is just and due to his memory, that the records of this court should, so long as they exist, transmit to those who shall follow us, the expression of the great respect and attachment entertained for him by this bar.

Having, for nearly thirty years, practiced before Judge Ware, I trust that in the presence of so many of the bar who have not been thus favored, I may be excused for referring briefly to the manner in which he discharged the duties of his position, and in acknowledging the heavy indebtment we are under to him for his studious labors in the admiralty law, and the information he has imparted to us upon this branch of jurisprudence.

In 1822, Peters' and Bee's were the only reports of decisions in the District Courts of the United States, and most of the opinions contained in these volumes were quite brief and meagre of authority, so that Judge Ware, in almost every question of admiralty and maritime law, was compelled to depend on his own researches into the ancient laws of the sea and maritime codes, and his own wisdom and judgment, for his conclusions, as the cases were presented before him for decision. Fortunately for him, his practice in the courts of common law had been of but little moment. His mind was not trammeled by the harsh and unyielding rules of Lord Coke and his followers, and being naturally of a broad catholic tendency, it was with the greatest satisfaction that he found himself at full liberty to adopt, modify, and apply the pliant rules of equity and admiralty, as the law of his court, according to the circumstances of each particular case. The strict rules of the law of evidence did

not always receive his sanction and approval, as some of us may well recollect his readiness to hear almost all that a witness might press into the case, although much of the statement would not have been received in a court of common law.

Judge Ware's literary acquirements were second to no man's in this District. He was conversant with the Greek and Latin, as well as with the French, languages, and could thus investigate and examine for himself their authorities without depending on the assistance of others. His extensive acquaintance with the Roman law and the various French writers on commercial and admiralty law is manifest in almost every one of his opinions, which we now possess. He most thoroughly enjoyed the investigation of questions of admiralty and maritime law, making the most diligent search and examination among the rules and sea laws of the ancient marts of commerce, and he pursued his studies and explorations until he was complete master of the subject, so that nothing remained for him, but to present his conclusions in that clear and beautiful manner which is so distinguishing a characteristic of all his opinions, and in which he has never been surpassed, either at home or abroad. Quite often his opinion was not restricted to a mere determination of the rights of the parties iu the cause, but, conscious of the importance of his labors, and of the benefit to be derived from the knowledge he would thus impart, he made his opinion a most elaborate and finished exposition of the great principles of admiralty and maritime law involved in the matter in controversy, in relation to which at that time, the entire profession was almost universally ignorant. So complete and thorough were his examinations, so convincing his judgments, that in many cases since his time, the most learned and eminent jurists have referred to them as conclusive authority on the questions he so well investigated, being convinced that their own researches would shed no new light upon a matter which had received the careful and diligent investigation of Judge Ware. His written opinions were deemed so valuable, both to the public and the profession, that they were generally made public through the press immediately on their announce-

ment, and they at once were accorded by the entire profession, the very front rank in admiralty and maritime jurisprudence. In the year 1839, the first volume of his reports was published, followed by a second in 1849, and the demand for these works has been so great as to require a second edition of each of them.

A large number of treatises upon admiralty law, and volumes of decisions of various Courts of Admiralty, both in England and this country, have since that time issued from the press, but all, I believe, are under great obligations to Judge Ware, and no one can acquire a knowledge of admiralty law, without an intimate acquaintance with his decisions. It is quite extraordinary, the multiplicity of questions which he examined, and upon which we enjoy the fruits of his labors. Since I have occupied this chair, hardly a maritime question has been presented to me, in which I have not at once turned to his reports, and derived great assistance from them. In a large majority of the cases, I think I may truly say, I have found in his opinions principles there laid down, applicable to the case I was investigating, and so clearly stated that my own labors were at an end, and nothing further remained for me but to acknowledge my obligations and recognize their authority. I believe no treatises or reports are now extant which are at this moment more useful to the profession, or more frequently acknowledged as authority, or which can afford more knowledge and information than these reports. There is not a judge administering the admiralty law, either in this country or in England, who has not profited by the labors of Judge Ware, and gratefully acknowledged the obligations thereby conferred. The debt due from us all to the profession, according to Lord Bacon, was more than paid by Judge Ware. It was not discharged by any depreciated currency, but was paid in full in pure coin, both principal and interest.

Judge Ware was of marked simplicity of character, and was always actuated by entire singleness of heart and purpose. The kindest and most friendly relations ever existed between him and the members of this bar. His intercourse with us was ever free and informal, never in the least pretentious; and it always was a

pleasure to him, to assist us by his advice in relation to his own decisions, as well as to principles of law upon which we desired information; and I have very frequently in this manner received from him most valuable assistance which it would have been extremely difficult, if not impossible, to have procured from any other source. He had no favorites. Every one who appeared in his court, whether young or old, was certain that all stood on an equality in his presence. With courtesy and the greatest patience, he listened to the views which counsel saw fit to present, the manifest purpose of the judge being to obtain light, to aid him in his determination of the cause, without regard to the source whence it was derived. No one ever took part in a trial before the judge, without becoming attracted to him, and feeling the highest respect for him, as well for the kindness of heart ever exhibited to whatever counsel a party might select to advocate his rights, as for his diligent attention, for his acute wisdom and judgment, and the learning and research manifested in his elaborate opinions.

Many of the causes brought before a Court of Admiralty, such as claims for wages, torts, etc., are of small amount, and of such a nature that any protracted delay of judgment therein, is tantamount to a denial of justice. In this class of cases, the court, under the conduct of Judge Ware, always sat '*velis levatis*.' Most of these causes were decided upon the conclusion of the arguments, and those which were retained for advisement, were at once examined, and an opinion prepared and announced in a very few days. The researches I have made do not indicate, that in any admiralty cause presented to him for decision, his opinion was delayed for more than thirty days, and generally it was announced the week succeeding the hearing.

Judge Ware was alike attentive and diligent in the discharge of his duties as a member of the Circuit Court for this District, always attending the sessions of that court as long as his health would permit. He frequently presided at jury trials, but his enunciation was not clear and distinct, and his charges were not so fascinating and effective as those of his eminent associate, Mr. Justice Story,

but his rulings and instructions were almost invariably sustained when presented for reëxamination, and on one occasion I remember, against his own convictions, he having become satisfied that they were erroneous, whilst his associate was of opinion that they were strictly correct, his honesty of purpose leading him to insist on his ultimate opinion and for the reversal of his rulings at *nisi prius*—and no judge ever strove more firmly to correct what he believed to have been an error committed by himself, than did Judge Ware on this occasion.

In another cause he could not concur in an opinion prepared by Mr. Justice Story, and although no jurist ever existed whose opinion was, with Judge Ware, of so high authority as that of Judge Story, he felt obliged to prepare a dissenting judgment, which upon appeal to the Supreme Court received the sanction and approval of that tribunal.

For some time before his resignation, it was quite manifest to all, that the infirmities of old age were gathering around him. His hearing was so impaired that for a number of years he was under the necessity of taking his seat within the bar with the witnesses in close proximity, that he might understand their testimony. No one was so conscious of his weakness and infirmity as the Judge, and I know that his resignation would have been presented at a much earlier day, if he had not, with strict sense of justice, realized, that he had claims upon the public, after expending so many years in its service, which it had no right to expect him to surrender so long as he could attend to the duties of his office. A year or two since, some of you, believing it but a partial recompense for the benefit he had conferred upon the profession, as well as upon the whole mercantile community, endeavored to induce Congress to allow Judge Ware the advantages of the retiracy provisions, which have since been conferred upon the judges of the Federal Courts. The House of Representatives almost unanimously acceded to the proposal, but it was defeated in the Senate.

This kind-hearted, learned, and good Judge, has finished his labors on earth, and it only remains for us, who have been so profit-

ed thereby, and who have been so highly favored by his wisdom and learning, to testify our acknowledgment of our great obligations, by the open record in this tribunal, where he so long and so eminently presided, of our testimonial in respect and honor of his memory.

At the close of these remarks, the court adjourned.

Such eloquent tributes, so appropriately paid to the character and labors of the eminent Judge, the closing chapter of whose official service has been committed to the Reporter for supervision, leave nothing to be added of public interest. But the pen (of one who for many years as Clerk of the Circuit Court, was associated with Judge Ware) still lingers over the memory of virtues better observed in those daily walks where true character is best exemplified. While the commercial world owes gratitude for his judicial labors, the little circle near by his Chambers, could best appreciate the kindliness of his nature, and have profited most by the charm of his conversation. Though largely retired from public observation, except when in court, Judge Ware always delighted in a cordial intercourse with those whose official relations presented frequent opportunity for it. To be in companionship with

one whose sense of justice was the crowning excellence of his character, and to listen to the words of one whose genial nature added lustre to the wealth of his learning on almost every subject, was no ordinary privilege. While all properly may have been eager to twine a wreath of laurels for his fresh-made grave, one sprig at least, and that, providentially the last, may well be added by

G. F. E.

INDEX.

ACCOUNTS.

1. The admiralty has no jurisdiction over matters of account, merely as accounts, although it may have jurisdiction over all the items in the account. *The Larch*, 28.

2. If it is apparent from the pleadings, that the main object of the libel is the settlement of the account, the libel will be dismissed. *Ib.*

3. If the accounts arise incidentally in the cause, then it is a question of sound discretion, whether the court will proceed with the cause. If the accounts are simple, consisting merely of offsets, the court will strike the balance and give judgment for that. If they are multifarious and involve the settlement of intricate questions of law or equity, which more properly belong to another forum, the libel will be dismissed. *Ib.*

See FREIGHT, 1, 2.

ACTION.

See PRACTICE, 1, 2, 3, 4, 5.

ADMIRALTY.

See JURISDICTION, 1, 4, 5.

AFFREIGHTMENT.

See FREIGHT.

ATTACHMENT.

The nature and kind of possession which an officer is bound to keep of personal property attached to save the attachment. *The Orpheus*, 143.

AVERAGE AND CONTRIBUTION.

See SALVAGE, 8, 9, 10.

BILL OF LADING.

1. When goods are laden on board of a vessel, the master is bound by the contract to give a bill of lading of them. But a bill of lading, in its essence, only contains a receipt of the goods with a promise to carry and deliver them according to the terms of the contractor. *The May Flower*, 300.

2. The price of the carriage and delivery is no essential part of the instrument, and is inserted merely for the convenience of the parties. If it is not agreed upon, or there is a misunderstanding between the parties on this point, the master is not obliged to give a bill of lading determining the freight. *Ib.*

BLOCKADE.

1. A blockade, as that word is understood by the law of nations, is an investment of a town of one belligerent by the forces of another. *U. S.* v. *The William Arthur*, 276.

2. Every nation of common right may declare what shall be ports of entry and delivery, and participate in trade by law, and enforce their laws by such means and penalties as she pleases. If she places armed ships before them, this does not constitute a blockade, as understood by public law, but is a mere municipal regulation, though familiarly called a blockade. *Ib.*

BOND.

See IMPORTATION, 5.

BOUNTY.

A court of admiralty has jurisdiction to decree the bounty allowed to persons employed in the cod fishery, and a claim for this may be united with a claim for an account of the fish taken during the voyages. *The Lucy Anne*, 253.

BUILDER OF VESSEL.

See MATERIAL MEN.

CHARTER PARTY.

1. In a libel by the owners on a charter-party, for refusing to furnish a cargo on the pretence that the ship was unseaworthy, the burthen of proving the seaworthiness is upon the owners. *The Vincennes*, 171.
2. Where by the terms of a charter-party the hirers of a vessel covenanted to return her on the expiration of the service in like good condition as when she sailed, ordinary wear and the damages of the seas excepted, the risk of a loss by fire is on them. *Merrill* v. *Arey*, 215.
3. 'Dangers of the seas' include only those which accrue from the action of the elements, and such as are incident to that cause, rather than all that arise on the sea. An accidental fire is not one of the peculiar dangers of the sea. *Ib.*
4. In all contracts, both for service performed, and for dangers assumed by the way of bottomry or insurance, the maritime law gives full indemnity, but no more. *Ib.*

5. A charter-party will not be construed to be a demise of the ship, although her whole capacity is let; unless the possession is transferred to the charterer. *Brig Eris*, 225.

6. By the maritime law, when a ship is chartered to one or more parties out and home, freight will be due to each port where cargo is delivered, though the ship is lost on her return home. By the maritime law, freight is due as far as the charterer has had the beneficial use of the vessel. *Ib.*

7. The owner and charterer as between themselves may make the whole freight, in such a voyage, to depend on the safe arrival of the ship at her home port, or on any other contingency. *Ib.*

8. But when they make the freight to depend on any farther condition than the safe delivery of the cargo, this will not affect the right of others who have an interest in the freight, as seamen for their wages, or lenders on bottomry. *Ib.*

9. They trust to the ship, and have their rights against the freight as appurtenant to the ship; and as far as she has earned freight, by the maritime law, their rights cannot be impaired by any private agreement between the owner and charterer, to which they are strangers. *Ib.*

10. When a vessel is chartered at a monthly freight on a round voyage to one or more ports, and the language of the contract leaves it doubtful whether the voyage is single or divisible, for the purpose of freight, the presumption is that it is divisible, and against the waiver by the owner of his legal rights. And this presumption holds, although the freight is made payable after the ship returns to her home port. *Ib.*

11. But if she is chartered for a gross sum for the round voyage, and that by the terms of the contract is made payable after her return to her home port, it seems that the presumption is, that the whole voyage is one and indivisible, and that no freight is due to the owner until the whole is completed. *Ib.*

12. But if not made payable on that or any other contingency than the delivery of her cargo, the presumption of the law is, that it is a divisible voyage. *Ib.*

13. By the general maritime law, the contract for freight is an entirety, and includes both carriage and delivery. *The Brig Cuba*, 260.

14. The exception, dangers of the seas, excuses the master for a non-delivery, but does not authorize a demand of freight. *Ib.*

15. By a special contract, by which the amount of freight was made to depend on the gross gauge of the casks delivered, it is immaterial how the loss was occasioned, whether by ordinary leakage or the dangers of the seas. *Ib.*

COLLISION.

1. When a vessel comes down with the wind free in an open sea, to speak another vessel which is close-hauled on the starboard tack, the former has the entire duty of so manœuvring as to avoid a collision, and it is the duty as well as the right of the latter, in case a collision is apprehended, to keep her course. *The Clara M. Porter*, 39.

2. If a vessel with the wind free attempts, without necessity, to cross the bows of a vessel close-hauled, and a collision takes place, the former vessel will be held *prima facie* to be in fault. *The Clara M. Porter*, 39.

3. A vessel was drifting in a field of broken ice, all her crew having abandoned her for the safety of their lives, and in imminent danger of coming in collision with another vessel at anchor, with one man left on board. The collision was prevented by cutting the cable, which, with the anchor, was lost. *The John Perkins*, 87–89.

4. *Held*, whether it was the fault or misfortune of the vessel to have been left by her whole crew, she was bound to pay for the loss of the cable and anchor of the vessel which had a man on board; as every vessel must bear the consequences of her misfortunes, as well as her faults; and that this might be recovered as salvage. But the vessel having contributed nothing of active service towards the safety of the vessel, could claim nothing further. *Ib.*

5. Though the sacrifice was equally necessary to the safety of the salvor vessel, under these circumstances the sacrifice was not a case of average and contribution. *Ib.*

6. When a steamer and sailing vessel are approaching each other in such a direction that there is danger of a collision, the sailing vessel has the right of way, and should hold on her course, whether she has the wind free or is close-hauled. *The Louisa*, 130.

7. It is the duty of the steamer to take the necessary precaution to keep out of her way. If she does not, and a collision happens, she will *prima facie* be deemed in fault. *Ib.*

8. When two vessels are approaching each other so that there is danger of their meeting, the general rule is that each vessel is to keep to the right. *Ib.*

9. This in all ordinary cases is the rule whether both are sailing vessels or both steamers, or one is a steamer and the other moved by the wind. *Ib.*

10. If two vessels come in collision, with faults on both sides, or the fault is inscrutable, the damage is divided between them, by the maritime law. *The Ship John Henry*, 264.

11. At common law, where the plaintiff can recover only on the strength of his own title, and not on that of the weakness of his adversary, his complaint is rejected, if the collision is traced in part to his own fault. *Ib.*

12. Vessel condemned for want of sufficient ground tackle. *The Echo*, 289.

13. When two vessels are approaching each other in opposite directions, one of which is free and the other close-hauled to the wind, the one free must take the responsibility of avoiding a collision, and the one close-hauled must keep her way. *The Radama*, 307.

14. But if the wind is equally free to both, or if both have it on their beam, each must turn to their own right. *Ib.*

15. In collision cases the injured vessel is entitled to be put into as good condition as she was in before the injury, and no allowance, as in insurance cases, when new materials are used, is made for new instead of old.

The Jeannie Cushman, 309.

16. Upon the question, whether demurrage should be allowed while the injured vessel is undergoing repairs, no certain and uniform rule is established. *Ib.*

COMMERCE.

The commerce of the country is a unity, and wherever it goes it is governed and protected by the laws of the United States. *Roberts* v. *Skolfield*, 184.

COMMON CARRIER.

1. When a vessel arrives from a foreign port, and the master has safely moored his vessel at a suitable wharf, it is his duty to give early notice to the consignees of the cargo of his arrival, where his vessel lies, and that he is ready to deliver their goods. And the same rule applies to long coasting voyages.

The Tangier, 110.

2. The notice ought regularly to be given before the unlading is begun. *Ib.*

3. After such notice, and a permit is obtained, he may ordinarily, at a proper time and in the working hours of the day, proceed to discharge the cargo. *Ib.*

4. It is the duty of the consignees, on receiving such notice, promptly to be on the wharf to receive their goods as they are discharged from the vessel. *Ib.*

5. When the master, with such notice, has transferred the goods from the vessel and safely deposited them on the wharf, where and at a time when they can with reasonable convenience be received by the consignees, he has completed his contract as a carrier. *Ib.*

6. But this does not amount to a delivery until the consignee receives them. *Ib.*

7. A delivery, in the sense in which the word is used in a bill of lading, includes a transfer of the possession, actual or constructive, and with it the right and liabilities incident to the possession. *Ib.*

8. If the consignee is not present to receive the goods, or for any cause declines to do it, the placing the goods on the wharf is a tender of delivery that discharges the master as a carrier, but the goods remain in his custody with the responsibilities of an ordinary bailee for hire. *Ib.*

9. If after the unlading is begun and before it is completed, a Fast-day intervenes, the master, by the custom of the port of Boston, is authorized to continue the work as on an ordinary working day, at least in the forenoon. *Ib.*

10. Or if the work has been suspended by the wharf being crowded, and it is then cleared, he may recommence the unlading without any new notice; and when the goods are placed on the wharf, he will be discharged as a carrier.
The Tangier, 110.

CONDITION.

When a condition precedent is annexed to a gift, that cannot be repudiated and the gratuity received unconditionally. *The Lucy Anne*, 253.

CONSIGNEE.

SEE COMMON CARRIER.

CONSTRUCTION OF CONSTITUTION.

1. The general maritime law was adopted by the constitution of the United States, and no State can have a separate and distinct maritime law by itself.
Roberts v. *Skolfield*, 184.

2. This law governs the crews of the vessels of the United States, wherever they go, whether in a port of the Union, or in a foreign port. *Ib.*

3. When the constitution adopts the admiralty and maritime jurisdiction, it adopts also the law by which it is governed. *Ib.*

4. The power of the United States to govern seamen, may also be derived from the commercial power. The power to regulate commerce includes that of navigation. *Ib.*

5. When a seaman engages in a commercial adventure, the laws of the United States follow him until the voyage is completed, whether in a foreign country, or the Union. *Ib.*

6. The commerce of the country is a unity, and wherever it goes it is governed and protected by the laws of the United States. *Ib.*

7. The constitutional power of Congress to pass the law of 1850, § 1, relative to recording the transfer of vessels.
The Martha Washington, 245.

CONSTRUCTION OF STATUTES.

1. The fishing business is a trade within the meaning of the License Act of Feb. 18, 1793. The meaning of the word trade in the Act, is equivalent to employment, and every act of trade beyond the scope of the license subjects the vessel to forfeiture under the 32d Section of the Act. *U. S.* v. *The Parryntha Davis*, 159.

2. The interpretation of doubtful and ambiguous words in a particular law, are, in revenue laws, to be explained in subservience to the common policy of the country. *U. S.* v. *Whidden*, 269.

3. The laws of the United States, of July 13th, and Aug. 6th, 1861, are purely municipal regulations, with which foreigners have no concern. *U. S.* v. *The William Arthur*, 276.

4. Where an intent is charged in a statute as constituting part of a crime, it must be proved as a fact. *Ib.*

5. The words aid, abet, and promote, used in the law of Aug. 6, 1861, are words of uncertain meaning, as to their intent, and in this law are to be taken in their largest extent. *Ib.*

See PROVISIONS.

CONTRACT.

1. A father shipped his son, a minor, under the age of seventeen, by a contract in the common form, for a whaling voyage to the Pacific Ocean and elsewhere. The son faithfully did duty during the whole period of his minority, and afterwards deserted before the termination of the voyage :— *Coffin* v *Shaw*, 82.

2. *Held*, that the desertion did not forfeit the wages of the son during his minority, which were due to the father. The obligations of the father's contract terminated with his son's minority, and his responsibility for his acts ceased at the same time. *Ib.*

3. A simple promise, by one, of the act of another person who is *sui juris* is void. But a contract of guaranty or suretyship for the act of another, if on a sufficient consideration, is valid. *Ib.*

4. In a contract for the hire of a vessel on shares, that is, the hirer to victual, man, have the control of the vessel, and pay over to the proprietors a certain proportion of the net earnings as charter or hire, the general owners are not responsible for supplies or repairs furnished in a foreign port. *The H. B. Foster*, 165.

5. But the vessel is liable whether the hirer navigate her himself or employ another master. *Ib.*

6. Every person who furnishes such supplies or repairs to a foreign vessel is, by the maritime law, considered as contracting with the vessel herself as a principal debtor, as well as with the master and owners. *The H. B. Foster*, 165.

7. The natural and legal presumption in such a case is that the creditor looks to the vessel as one of his securities, because no person is ever presumed without proof to renounce any of the securities provided for him by law. *Ib.*

8. When a crew is put on short allowance without necessity, in a case not within the act of Congress, there is a wrong in breach of contract, and a remedy will be given by a court of admiralty, in the form of additional wages. *The John L. Dimmick*, 196.

9. It is a well-understood term of contract, that the crew, during the period of their service, shall be furnished with provisions by the owners, sufficient in amount and of a suitable quality; and to refuse such a supply, without necessity, is as much a breach of the contract as to refuse payment of their wages, though this obligation is not expressed in the written or printed contract. *Ib.*

10. When the ship was lying in the bay of Mobile four months, waiting for cargo, and the usual supply of provisions from the ship's store were withheld, the crew being required to furnish themselves, by taking oysters from the oyster-beds, when the state of the weather permitted it to be done, and the supply being insufficient in quantity, they were held to be entitled to additional wages. *Ib.*

11. A contract for a voyage having no terminus as to time or place is void. *The Horace E. Bell*, 236. *Gifford* v. *Kollock*, 45.

12. The price of seamen's wages ought to be fixed according to the plain meaning of the parties, when that can be understood. *The Rochambeau*, 304.

13. Seamen are a plain people and are not to be presumed to advert to refined distinctions of law when they are not alluded to in the terms of the contract, or mentioned when it was made. *Ib.*

See EQUITY, 1, 2, 3.

CORPORATIONS.

1. The acts of the Directors of a corporation in the transaction of its business, are the acts of the corporation. They bind the corporate body, but not themselves personally. *Smith* v. *Poor*, 148.

2. This is when they act within the limits and scope of the powers granted to the corporation. If they exceed these limits, their acts are their own and they are personally responsible, and not the corporation. *Ib.*

3. Generally a stockholder can maintain no action against the Directors or other agents of the corporation for a misuse or abuse of their official powers, by which the corporate property is wasted. The injury in such a case is a single and indivisible injury to the corporation and not a several injury to each stockholder, and the remedy must be sought in a single suit by the corporation. *Ib.*

4. An exception is allowed when the acting Directors fraudulently and by collusion refuse to institute a suit, or when they are the wrong doers. Then a suit in Equity may be maintained against the Directors by any of the stockholders suing for themselves and all the other stockholders. *Smith* v. *Poor*, 148.

5. It seems that a stockholder is not debarred from maintaining an action either against the Directors or the corporation for a private and personal wrong to himself, and not a wrong to him as a stockholder, which can be maintained by a stranger. *Ib.*

COSTS.

1. The act of Congress of March 3, 1847, regulating costs in admiralty proceedings *in rem*, where less than a hundred dollars is recovered, is repealed by the act of Feb. 26, 1853. The process Act of July 12, 1813. *The Young Mechanic*, 58.

2. The admiralty has a general discretionary power over costs, and when a seaman has a just cause of complaint it will deny him costs, unless he allows to the master and owners a reasonable time for an amicable settlement of the dispute before commencing his libel. *The Susan*, 223.

3. When two libels are filed where only one is required, costs only in one are allowed. *The R. P. Chase*, 294.

CUSTOM.

1. A custom is obligatory on the parties only when the law does not provide for the case. *The Lucy Anne*, 253.

2. If the usage of a particular port, or a particular trade, authorizes an interpolation of the port of departure as the port of termination, this must be qualified by another implied term, that the return of the vessel to her home port shall be within a reasonable time. *Gifford* v. *Kollock*, 45.

3. *Quære*, how far the responsibility of a master of a vessel, for the accuracy of the accounts of the lading and delivery of a cargo, may be affected by the usage of a particular trade. *Steelman* v. *Taylor*, 52.

See FAST DAY.

DAMAGES.

1. The nature and measure of damages considered. When intentional and when not. *The Harriet Newhall*, 105.

2. A set-off, or compensation founded on contract, express or implied, is no defence to a libel in a cause of damage. But in a suit by a parent for the wrongful abduction of his minor son, where the damage, substantially, is loss of service, the court is not absolutely precluded from taking into consideration, in determining the amount of damage, the advances of clothing and other necessaries for the minor during the time. *The Platina*, 180.

3. In all contracts, both for service performed, and for dangers assumed by the way of bottomry or insurance, the maritime law gives full indemnity, but no more. *Merrill* v. *Arey*, 215.

4. In collision cases the injured vessel is entitled to be put into as good condition as she was in before the injury, and no allowance, as in insurance cases, when new materials are used, is made for new instead of old. *The Jeannie Cushman*, 309.

5. Upon the question, whether demurrage should be allowed while the injured vessel is undergoing repairs, no certain and uniform rule is established. *Ib.*

DEMURRAGE.

Upon the question, whether demurrage is allowable while the vessel, injured by collision, is undergoing repairs, no certain and uniform rule is established. *The Jeannie Cushman*, 309.

DANGERS OF THE SEAS.

1. Where by the terms of a charter-party the hirers of a vessel covenanted to return her on the expiration of the service in like good condition as when she sailed, ordinary wear and the damages of the seas excepted, the risk of a loss by fire is on them. *Merrill* v. *Arey*, 215.

2. 'Dangers of the seas' include only those which accrue from the action of the elements, and such as are incident to that cause, rather than all that arise on the sea. An accidental fire is not one of the peculiar dangers of the sea. *Ib.*

3. The exception, in a charter-party, of dangers of the seas, excuses the master for a non-delivery. *The Brig Cuba*, 260.

4. By a special contract, by which the amount of freight was made to depend on the gross gauge of the casks delivered, it is immaterial how the loss was occasioned, whether by ordinary leakage or the dangers of the seas. *Ib.*

DELIVERY OF GOODS.

1. By the general maritime law, the contract for freight is an entirety, and includes both carriage and delivery. *The Brig Cuba*, 269.

2. The exception, dangers of the seas, excuses the master for a non-delivery, but does not authorize a demand of freight. *Ib.*

3. By a special contract, by which the amount of freight was made to depend on the gross gauge of the casks delivered, it is immaterial how the loss was occasioned, whether by ordinary leakage or the dangers of the seas. *Ib.*

See COMMON CARRIER.

DERELICT.

See SALVAGE 1, 2.

DESERTION.

1. By the ancient maritime law, constituting the common law of the sea, desertion by seamen, during the voyage, works a forfeiture of all wages previously earned. But the law is not imperative. The court may take into consideration palliating circumstances, not amounting to a justification, and mitigate the penalty to a reasonable indemnity to the owners. *Gifford* v. *Kollock*, 45.

2. The only case of desertion in which the forfeiture is absolute of the whole wages, is when all the requisites of the statute have been strictly observed. Statute July 20, 1790. *Ib.*

3. A father shipped his son, a minor, under the age of seventeen, by a contract in the common form, for a whaling voyage to the Pacific Ocean and elsewhere. The son faithfully did duty during the whole period of his minority, and afterwards deserted before the termination of the voyage :— *Coffin* v. *Shaw*, 82.

4. *Held*, that the desertion did not forfeit the wages of the son during his minority, which were due to the father. The obligations of the father's contract terminated with his son's minority, and his responsibility for his acts ceased at the same time. *Ib.*

DIRECTORS.

1. The acts of the Directors of a corporation in the transaction of its business, are the acts of the corporation. They bind the corporate body, but not themselves personally. *Smith* v. *Poor*, 148.

2. This is when they act within the limits and scope of the powers granted to the corporation. If they exceed these limits, their acts are their own and they are personally responsible, and not the corporation. *Ib.*

3. Generally a stockholder can maintain no action against the Directors or other agents of the corporation for a misuse or abuse of their official powers, by which the corporate property is wasted. The injury in such a case is a single and indivisible injury to the corporation and not a several injury to each stockholder, and the remedy must be sought in a single suit by the corporation. *Ib.*

4. An exception is allowed when the acting Directors fraudulently and by collusion refuse to institute a suit, or when they are the wrong doers. Then a suit in Equity may be maintained against the Directors by any of the stockholders suing for themselves and all the other stockholders. *Ib.*

5. It seems that a stockholder is not debarred from maintaining an action either against the Directors or the corporation for a private and personal wrong to himself, and not a wrong to him as a stockholder, which can be maintained by a stranger. *Ib.*

EQUITY.

1. Bill in equity for the specific performance of a contract for the sale of three-eighths of a ship now being built, with the right of the purchaser to the command, and for an injunction on the owners of the five-eighths against selling the same except with notice of this contract, and subject to whatever right the plaintiff may have under it, and against appointing any other person as master. *Higgins* v. *Jenks*, 17.

2. If the contract gives him any right in the nature of a privilege and preference to the command of the ship—an obligation, charge, lien, or *nexus* which follows and adheres to the thing, and qualifies the right of ownership, he is entitled to protection by injunction against the transfer of the five-eighths of the vessel without notice of his contract and of whatever rights he has under it. *Ib.*

3. But whether a preliminary injunction should issue against the appointment of any other person to the command is a question not free from doubt. The grounds on which Courts of Equity take jurisdiction to decree a specific performance of contracts stated. The rights of co-owners as to possession discussed. *Ib.*

4. A court of admiralty has no jurisdiction to try questions of equitable title to vessels, or to enforce the equities between mortgagor and mortgagee of vessels; it can only pass upon the legal title. *The William D. Rice*, 134.

5. Generally a stockholder can maintain no action against the Directors or other agents of a corporation for a misuse or abuse of their official powers, by which the corporate property is wasted. The injury in such a case is a single and indivisible injury to the corporation and not a several injury to each stockholder, and the remedy must be sought in a single suit by the corporation.
Smith v. *Poor*, 148.

6. An exception is allowed when the acting Directors, fraudulently and by collusion, refuse to institute a suit, or when they are the wrong doers. Then a suit in Equity may be maintained against the Directors by any of the stockholders suing for themselves and all the other stockholders. *Ib.*

7. The reasonableness and equity of an agreement between owners and seamen will always be examined by a court of admiralty. *The Lucy Anne*, 253.

EMBEZZLEMENT.

1. Any embezzlement of the saved property by salvors, works an absolute forfeiture of all salvage. *The John Perkins*, 87, 89.

2. Embezzlement by other persons does not forfeit the right of innocent salvors. *Ib.*

EVIDENCE.

1. In a libel by the owners on a charter-party, for refusing to furnish a cargo on the pretence that the ship was unseaworthy, the burthen of proving the seaworthiness is upon the owners. *The Vincennes*, 171.

2. When the question of seaworthiness is in issue, evidence of the performance of voyages, immediately before or after that contemplated, is inadmissible, except so far as they may offer just inferences as to her actual condition at the time. *Ib.*

3. The act of Maine, admitting parties to be witnesses, does not apply to the admiralty. *The Australia*, 240.

4. The practice is to allow either party to examine the other on interrogatories, and the answers they give are evidence in the case. But the answers, though under oath, are not properly evidence. *Ib.*

NOTE.—By Act of Congress of July 2, 1864, c. 210, § 3, no witness is now excluded by reason of being a party, or of interest.

See INTENT.

FAST DAY.

See COMMON CARRIER.

FISHING BUSINESS.

1. The fishing business is a trade within the meaning of the License Act of Feb. 18, 1793. The meaning of the word trade in the Act, is equivalent to employment, and every act of trade beyond the scope of the license subjects the vessel to forfeiture under the 32d Section of the Act. *U. S.* v. *The Paryntha Davis*, 159.

2. Since the Act of May, 1828, authorizing a special license for the mackerel fishery, that is a trade distinct from the cod fishery. *Ib.*

3. A vessel with a cod-fishing license may take mackerel for bait, or for the consumption of the crew, but if she engages in this fishery as a business, she is liable to forfeiture. *Ib.*

4. A court of admiralty has jurisdiction to decree the bounty allowed to persons employed in the cod fishery, and a claim for this may be united with a claim for an account of the fish taken during the voyages. *The Lucy Anne*, 253.

5. A custom is obligatory on the parties only when the law does not provide for the case. *Ib.*

6. When a condition precedent is annexed to a gift, that cannot be repudiated and the gratuity received unconditionally. *Ib.*

7. The reasonableness and equity of an agreement between owners and seamen will always be examined by a court of admiralty. *Ib.*

FORFEITURE.

1. The fishing business is a trade within the meaning of the License Act of Feb. 18, 1793. The meaning of the word trade in the Act, is equivalent to employment, and every act of trade beyond the scope of the license subjects the vessel to forfeiture under the 32d Section of the Act.
U. S. v. *The Paryntha Davis*, 159.

2. Since the Act of May, 1828, authorizing a special license for the mackerel fishery, that is a trade distinct from the cod fishery. *Ib.*

3. A vessel with a cod-fishing license may take mackerel for bait, or for the consumption of the crew, but if she engages in this fishery as a business, she is liable to forfeiture. *Ib.*

4. An information against 26 cases of rubber boots as liable to forfeiture under the 66th section of the act of March 2, 1799, ch. 128, for the production of an invoice by the importer at the entry not according to the actual cost, but below it, with the design to evade the duties. *U. S.* v. 26 *Bales R. Boots*, 205.

5. Plea, that the importer was the manufacturer of the goods, adjudged good. *Ib.*

6. The 36th section of the act requires the importer in all cases to enter his goods at the actual cost, and verify his entry by oath, and to produce at the entry the original invoice and bill of lading; and by the 66th section, if the invoice thus produced is made not according to the actual cost, with a design to evade the duties or a part of them, the goods or their value shall be forfeited. *Ib.*

7. The act of 1823 excepts from the act of 1799, the case of an importer who is the manufacturer of the goods, or who has obtained them otherwise than by purchase and requires of him an invoice stating the true market value. *Ib.*

8. Smuggling by seamen is a grave offence, but does not absolutely work a forfeiture of their whole wages. *The Horace E. Bell*, 236.

9. A vessel, arriving from a foreign port, is forfeited by landing goods without a permit from the collector after her arrival in the port of discharge. *The John C. Brooks*, 273.

10. Intemperance, if it wholly disqualifies a seaman from performing his duties, is a forfeiture of all wages, but if occasional only, it is marked by a deduction of wages according to circumstances, or by the courts entirely overlooked. *The Jasper*, 296.

11. The disobedience of a seaman is a very serious fault, and if persevered in is a forfeiture of all claim for wages. *The Polledo*, 321.

12. By the Act of March 3d, 1863, when goods are refused an entry for want of an invoice, if the owner thereof attempts to procure an entry by any false and fraudulent practice or appliance, whatever, the goods are forfeited. *U. S.* v. 39,150 *Cigars*, 324.

FREIGHT.

1. *Quære*, how far the responsibility of a master of a vessel, for the accuracy of the accounts of the lading and delivery of a cargo, may be affected by the usage of a particular trade. *Steelman* v. *Taylor*, 52.

2. In a common contract of affreightment, the master is entitled to full freight on all the goods laden and borne on the bill of lading, though they may be by natural causes, and without his fault, deteriorated in quality, or diminished in quantity when delivered. *Ib.*

3. When a ship, in consequence of a disaster occasioned by the dangers of the seas, is obliged to put into a port for repairs, if they are such as will require considerable time, the master, for the interest of the shipper, may sell such part of the cargo as is of a perishable nature. *The Velona*, 139.

4. The shipper may recover the proceeds of the sale by a libel against the ship. *Ib.*

5. In such case no freight is due to the master. *Ib.*

6. The only case in which a *pro rata* freight is due, is when the merchant voluntarily accepts his goods at an intermediate port, not when they are forced on him by necessity. *Ib.*

7. By the maritime law, when a ship is chartered to one or more parties out and home, freight will be due to each port where cargo is delivered, though the ship is lost on her return home. By the maritime law, freight is due as far as the charterer has had the beneficial use of the vessel. *Brig Erie*, 225.

8. The owner and charterer as between themselves may make the whole freight, in such a voyage, to depend on the safe arrival of the ship at her home port, or on any other contingency. *Ib.*

9. But when they make the freight to depend on any farther condition than the safe delivery of the cargo, this will not affect the right of others who have an interest in the freight, as seamen for their wages, or lenders on bottomry. *Ib.*

10. They trust to the ship, and have their rights against the freight as appurtenant to the ship; and as far as she has earned freight, by the maritime law, their rights cannot be impaired by any private agreement between the owner and charterer, to which they are strangers. *Ib.*

11. When a vessel is chartered at a monthly freight on a round voyage to one or more ports, and the language of the contract leaves it doubtful whether the voyage is single or divisible, for the purpose of freight, the presumption is that it is divisible, and against the waiver by the owner of his legal rights. And this presumption holds, although the freight is made payable after the ship returns to her home port. *Ib.*

12. But if she is chartered for a gross sum for the round voyage, and that by the terms of the contract is made payable after her return to her home port, it seems that the presumption is, that the whole voyage is one and indivisible, and that no freight is due to the owner until the whole is completed. *Ib.*

13. But if not made payable on that or any other contingency than the delivery of her cargo, the presumption of the law is, that it is a divisible voyage. *Ib.*

14. By the general maritime law, the contract for freight is an entirety, and includes both carriage and delivery. *The Brig Cuba*, 260.

15. The exception, dangers of the seas, excuses the master for a non-delivery, but does not authorize a demand of freight. *Ib.*

16. By a special contract, by which the amount of freight was made to depend on the gross gauge of the casks delivered, it is immaterial how the loss was occasioned, whether by ordinary leakage or the dangers of the seas. *Ib.*

GROUND TACKLE.

See COLLISION, 12.

IMPORTATION.

1. An information against 26 cases of rubber boots as liable to forfeiture under the 66th section of the act of March 2, 1799, c. 128, for the production of an invoice by the importer at the entry not according to the actual cost, but below it, with the design to evade the duties. *U. S.* v. 26 *Bales R. Boots*, 205.

2. Plea, that the importer was the manufacturer of the goods, adjudged good. *Ib.*

3. The 36th section of the act requires the importer, in all cases, to enter his goods at the actual cost, and verify his entry by oath, and to produce at the entry the original invoice and bill of lading; and by the 66th section, if the invoice thus produced is made not according to the actual cost, with a design to evade the duties or a part of them, the goods or their value shall be forfeited. *Ib.*

4. The act of 1823 excepts from the act of 1799, the case of an importer who is the manufacturer of the goods, or who has obtained them otherwise than by purchase, and requires of him an invoice stating the true market value. *Ib.*

5. When goods entered in debenture for re-exportation, have been exported, passed through a foreign custom-house and are subject to a retail trade, they are mixed with the common merchandise of the country, and may be again imported into this country. *U. S.* v. *Whidden*, 269.

6. By the Act of March 3d, 1863, § 1, the collector has no power to permit an entry of merchandise unaccompanied by an invoice, or a sufficient excuse for its absence, but it gives the Secretary of the Treasury that authority, and the same equitable power of remission as in other cases. *U. S.* v. 39,150 *Cigars*, 324.

7. By that act, when goods are refused an entry for want of an invoice, if the owner thereof attempts to procure an entry by any false and fraudulent practice or appliance whatever, the goods are forfeited. *Ib.*

INJUNCTION.

See EQUITY, 1, 2, 3.

INFORMATION.

See PLEADING, 1, 2, 3.

INTEMPERANCE.

Intemperance, if it wholly disqualifies a seaman from performing his duties, is a forfeiture of all wages, but if occasional only, it is marked by a deduction of wages according to circumstances, or by the courts entirely overlooked.
The Jasper, 296.

INTENT.

Where an intent is charged in a statute as constituting part of a crime, it must be proved as a fact *U. S.* v. *Whidden*, 269.

JUDGMENT.

See PLEADING, 4.

JURISDICTION.

1. The admiralty has no jurisdiction over matters of account, merely as accounts. although it may have jurisdiction over all the items in the account.
The Larch, 28.

2. If it is apparent from the pleadings, that the main object of the libel is the settlement of the account, the libel will be dismissed. *Ib.*

3. If the accounts arise incidentally in the cause, then it is a question of sound discretion, whether the court will proceed with the cause. If the accounts are simple, consisting merely of offsets, the court will strike the balance and give judgment for that. If they are multifarious and involve the settlement of intricate questions of law or equity, which more properly belong to another forum, the libel will be dismissed. *Ib.*

4. A court of admiralty has no jurisdiction to try questions of equitable title to vessels, or to enforce the equities between mortgagor and mortgagee of vessels; it can only pass upon the legal title. *The William D. Rice*, 134.

5. When property is in possession of a State Court it is exempted from the process of the United States Courts. *The Orpheus*, 143.

6. The nature and kind of possession which an officer is bound to keep of personal property attached to save the attachment. *Ib.*

7. The constitutional power of Congress to pass the law of 1850, § 1, relative to recording the transfer of vessels, raised but not decided. *Ib.*

8. A court of admiralty has no jurisdiction to decree possession of a vessel to the owners of a majority, when a title to such vessel is set up in mortgage. *The Martha Washington*, 245.

8. A court of admiralty has jurisdiction to decree the bounty allowed to persons employed in the cod-fishery, and a claim for this may be united with a claim for an account of the fish taken during the voyages. *The Lucy Anne*, 253.

LIEN.

1. The master has a lien on the freight for his wages, and necessary disbursements for the use of the ship. *The Bowditch*, 71.

2. The seamen have a lien on the freight for their wages, and, in case of shipwreck they have a lien on the savings of the wreck. They may have a further claim against the wreck in the nature of salvage, when it is saved by their exertion. *Ib.*

3. It is an entirely false notion of salvors, that in order to retain their lien on the property saved, they must retain the actual possession. This lien is a maritime lien that does not depend like a common-law lien, on possession. *The John Perkins*, 87, 89.

4. Fishermen who ship for a fishing voyage under a written contract, have a lien on the vessel for six months after the service is ended, and the fish sold for the value of their shares, which may be enforced by process in admiralty. *The Ianthe*, 126.

5. But the Statute makes no provision for fishermen who ship without a written agreement, but leaves them to the rights which their contract by law gives them. *Ib.*

6. A trench excavated in front of the launching ways of a ship, for the purpose of deepening the water, does not make a part of the launching ways, within the meaning of the act of the legislature of Massachusetts of 1855, chap. 231. *Woolly* v. *The Peruvian*, 154.

7. And though this was necessary for the launching of the vessel, yet as the trench remains to be used for other vessels, this was not, within the meaning of the act, labor performed in launching the vessel. *Ib.*

8. The general objects of the act are to give to material men, mechanics and laborers, a lien for all the materials and labor which go into the ship, constitute any part of it, and make up its entire cost. *Woolly* v. *The Peruvian*, 154.

9. For this the law constitutes the ship a debtor, and it is what she naturally owes, and it would require the most express and unequivocal language to extend the lien beyond this natural limit. *Ib.*

See OWNER OF VESSEL, 1, 2, 3.

LIMITATION, STATUTE OF.

In the admiralty, when the respondent intends to rely on the objection of the staleness of the claim, or any other defence that does not go to the merits, it should be propounded by formal plea, or by a distinct allegation in the answer. Otherwise, evidence will not ordinarily be received to support it.
The Platina, 180.

MASTER OF VESSEL.

1. When a ship, in consequence of a disaster occasioned by the dangers of the seas, is obliged to put into a port for repairs, if they are such as will require considerable time, the master, for the interest of the shipper, may sell such part of the cargo as is of a perishable nature. *The Velona*, 139.

2. The shipper may recover the proceeds of the sale by a libel against the ship. *Ib.*

3. In such case no freight is due to the master. *Ib.*

4. The only case in which a *pro rata* freight is due, is when the merchant voluntarily accepts his goods at an intermediate port, not when they are forced on him by necessity. *Ib.*

5. If a seaman proves unfit for the service for which he shipped, the master may degrade him to another duty. *The Australia*, 240. *The Alonzo*, 318.

6. To render a sale valid, made by a master of a vessel under the general authority vested in him, and convey a good title under it, there must be a necessity for such sale, and entire good faith on the part of the master.
The William Carey, 313.

7. If a master attempts to overcome a seaman's refusal of duty, he must be careful what means he employs. But the general conduct and behavior of the seaman may be fully inquired into. *The Polledo*, 321.

See COMMON CARRIER. EQUITY, 1, 2, 3. FREIGHT, 1, 2.

MATERIAL MEN.

1. A trench excavated in front of the launching ways of a ship, for the purpose of deepening the water, does not make a part of the launching ways, within the meaning of the act of the legislature of Massachusetts of 1855, chap. 231.
Wooley v. *The Ship Peruvian*, 154.

2. And though this was necessary for the launching of the vessel, yet as the trench remains to be used for other vessels, this was not, within the meaning of the act, labor performed in launching the vessel.

3. The general objects of the act are to give to material men, mechanics and laborers, a lien for all the materials and labor which go into the ship, constitute any part of it, and make up its entire cost.

4. For this the law constitutes the ship a debtor, and it is what she naturally owes, and it would require the most express and unequivocal language to extend the lien beyond this natural limit.

See VESSEL, 3, 4.

MINOR.

1. A father shipped his son, a minor, under the age of seventeen, by a contract in the common form, for a whaling voyage to the Pacific Ocean and elsewhere. The son faithfully did duty during the whole period of his minority, and afterwards deserted before the termination of the voyage :—
Coffin v. *Shaw*, 82.

2. *Held*, that the desertion did not forfeit the wages of the son during his minority, which were due to the father. The obligations of the father's contract terminated with his son's minority, and his responsibility for his acts ceased at the same time. *Ib.*

3. A set-off, or compensation founded on contract, express or implied, is no defence to a libel in a cause of damage. But in a suit by a parent for the wrongful abduction of his minor son, where the damage, substantially, is loss of service, the court is not absolutely precluded from taking into consideration, in determining the amount of damage, the advances of clothing and other necessaries for the minor during the time. *The Platina*, 180.

See VOYAGE, 1.

MORTGAGE.

A court of admiralty has no jurisdiction to try questions of equitable title to vessels, or to enforce the equities between mortgagor and mortgagee of vessels.
The William D. Rice, 134.
The Martha Washington, 245.

MONEY.

See CONTRACT, 12, 13.

THE NOXAL ACTION OF THE ROMAN LAW, 35.

NEUTRALITY.

A neutral, or neutrality, always implies three parties, two billigerents and a third, a common friend, all acknowledged as independent nations. But in a civil war there is only one party, insurgents are not acknowledged as a nation, but to foreigners they are mere malefactors. *U. S.* v. *The William Arthur*, 276.

OFFICER.

See POSSESSION, 1, 2.

OWNER OF VESSEL.

1. A part owner of a vessel, when the other part owners are present, has no authority to charge them by ordering repairs without their consent.
The Larch, 28.
2. But when a part owner is in possession he has that authority, when the vessel is in a foreign port and the other owners are absent. *Ib.*
3. In the latter case, he has a lien for his disbursements on the other owners' shares which he may enforce by a libel *in rem* in the admiralty. *Ib.*

4. In a contract for the hire of a vessel on shares, that is, the hirer to victual, man, have the control of the vessel, and pay over to the proprietors a certain proportion of the net earnings as charter or hire, the general owners are not responsible for supplies or repairs furnished in a foreign port. *The H. B. Foster*, 165.

5. But the vessel is liable whether the hirer navigate her himself or employ another master. *Ib.*

6. Every person who furnishes such supplies or repairs to a foreign vessel is, by the maritime law, considered as contracting with the vessel herself as a principal debtor, as well as with the master and owners. *Ib.*

7. The natural and legal presumption in such a case is that the creditor looks to the vessel as one of his securities, because no person is ever presumed without proof to renounce any of the securities provided for him by law. *Ib.*

See EQUITY, 1, 2, 3.

PLEADING.

1. In an information *in rem* for a forfeiture alleged to be incurred under the Collection Act of 1799, c. 22, § 66, it is essential to charge that the goods were entered under a false invoice, and that they were falsely invoiced with the design to evade the duties thereupon, or some part thereof. *U. S.* v. 3 *Parcels*, 75.

2. Therefore, where such an information only alleged that the *entry* was made below the actual cost, with the design, &c., and the court instructed the jury that the invoice must be falsely made, and with the design to evade the duties, and the jury found for the plaintiffs, it was held that judgment must be arrested. *Ib.*

3. It seems that such an information should be brought in the name of the United States alone, without making the seizing officers parties. *Ib.*

4. When a former judgment is relied on as a defence in the Admiralty, it should appear by the record that the precise question or title set up was passed upon in a former suit, not merely that it might have been. *The Vincennes*, 171.

5. In the admiralty, when the respondent intends to rely on the objection of the staleness of the claim or any other defence that does not go to the merits, it should be propounded by formal plea, or by a distinct allegation in the answer. Otherwise, evidence will not ordinarily be received to support it. *The Platina*, 180.

6. A set-off, or compensation founded on contract, express or implied, is no defence to a libel in a cause of damage. But in a suit by a parent for the wrongful abduction of his minor son, where the damage, substantially, is loss of service, the court is not absolutely precluded from taking into consideration, in determining the amount of damage, the advances of clothing and other necessaries for the minor during the time. *Ib.*

7. An action for a joint tort against two or more cannot, in the admiralty, be united with a tort against one separately, if the objection be taken.
Roberts v. *Skolfield*, 184.

8. A claim for the bounty allowed to persons employed in the cod-fishery may be united with a claim for an account of the fish taken during the voyages.
The Lucy Anne, 253.

See PRACTICE, 1, 2, 3.

POSSESSION.

1. When property is in possession of a State Court it is exempted from the process of the United States Courts. *The Orpheus*, 143.

2. The nature and kind of possession which an officer is bound to keep of personal property attached to save the attachment. *Ib.*

See JURISDICTION.

PRACTICE.

1. *Joinder of Parties.* In suits *in rem* all persons having claims of a like nature against the thing, may join in a single libel for the purpose of having that question decided, whether the claims arise from tort or contract.
The Young Mechanic, 58.

2. When a vessel is arrested by a lien creditor, all other such creditors may intervene by summary petition without having the vessel arrested again, and have their claims allowed. *Ib.*

3. *Quære.* When the vessel is delivered on a stipulation for her full value, whether such creditors may have the same remedy on the stipulation that they have against the vessel remaining in the custody of the court. *Ib.*

4. When several persons have causes of action of a like nature, and involving one or more questions common to all against a vessel, all may join in one libel.
The Tangier, 110.

5. In such case of joinder, the evidence touching the questions common to all is taken but once, and when these questions are decided, the cases become separate and independent, and each is litigated on its own merits. *Ib.*

6. When two libels are filed where one only is required, costs only in one are allowed. *The R. P. Chase*, 294.

See VOYAGE, 1.

PROVISIONS.

1. To entitle seamen to double wages, under the act of Congress, July, 1790, ch. 29th, sect. 9, on account of being put on short allowance of provisions, both the conditions mentioned in the act must concur, the vessel must have left her last port with a less amount of provisions than is required by the act, and the crew must have actually been put on short allowance during the voyage. *The John L. Dimmick*, 196.

2. The statute is in its nature a penal law, and is not to be enlarged by construction beyond the natural and obvious meaning of its terms. *Ib.*

3. To bring a case within the statute, the short allowance must be during the passage of the vessel, and before she arrived at her port of destination. *Ib.*

4. When a crew is put on short allowance without necessity, in a case not within the act of Congress, there is a wrong in breach of contract, and a remedy will be given by a court of admiralty, in the form of additional wages. *Ib.*

5. It is a well-understood term of contract, that the crew, during the period of their service, shall be furnished with provisions by the owners, sufficient in amount and of a suitable quality; and to refuse such a supply, without necessity, is as much a breach of the contract as to refuse payment of their wages, though this obligation is not expressed in the written or printed contract. *Ib.*

6. When the ship was lying in the bay of Mobile four months, waiting for cargo, and the usual supply of provisions from the ship's store were withheld, the crew being required to furnish themselves, by taking oysters from the oyster-beds, when the state of the weather permitted it to be done, and the supply being insufficient in quantity, they were held to be entitled to additional wages. *Ib.*

7. The daily allowance to seamen, in the merchant service, ought to be equivalent to the navy ration. *Ib.*

REMEDY.

The provision in the seaman act of 1790, that process shall not issue against the vessel until ten days after the vessel has arrived at her last port of discharge, except under certain contingencies, does not suspend the right to a personal suit, either in the admiralty or at common law, until after the expiration of that time. *The Susan*, 222.

REMISSION.

By the Act of March 3d, 1863, § 1, the collector has no power to permit an entry of merchandise unaccompanied by an invoice, or a sufficient excuse for its absence, but it gives the Secretary of the Treasury that authority, and the same equitable power of remission as in other cases. *U. S.* v. 39,150 *Cigars*, 324.

RIGHT OF WAY.

See COLLISION.

SALE.

To render a sale valid, made by a master of a vessel under the general authority vested in him, and convey a good title under it, there must be a necessity for such sale, and entire good faith on the part of the master.
The William Carey, 313.

See EQUITY, 1, 2.

SALVAGE.

1. Any vessel is not derelict until abandoned by the master, without an intention of returning and resuming the possession. *The Attacapas*, 65.
2. Principles on which salvage is allowed. *Ib.*
3. Any embezzlement of the saved property by salvors, works an absolute forfeiture of all salvage. *The John Perkins*, 87, 89.
4. Embezzlement by other persons does not forfeit the right of innocent salvors. *Ib.*
5. But salvors are not only bound to strict honesty themselves, but while in proximity, are bound to take all reasonable care to prevent plunderage by others. *Ib.*
6. A slight neglect in this particular, will be considered in awarding the amount of salvage; and gross negligence may be followed by an entire forfeiture. *Ib.*
7. It is an entirely false notion of salvors, that in order to retain their lien on the property saved, they must retain the actual possession. This lien is a maritime lien that does not depend, like a common-law lien, on possession. *Ib.*
8. A vessel was drifting in a field of broken ice, all her crew having abandoned her for the safety of their lives, and in imminent danger of coming in collision with another vessel at anchor, with one man left on board. The collision was prevented by cutting the cable, which, with the anchor, was lost. *Ib.*
9. *Held*, whether it was the fault or misfortune of the vessel to have been left by her whole crew, she was bound to pay for the loss of the cable and anchor of the vessel which had a man on board; as every vessel must bear the consequences of her misfortunes, as well as her faults; and that this might be recovered as salvage. But the vessel having contributed nothing of active service towards the safety of the vessel, could claim nothing further. *Ib.*
10. Though the sacrifice was equally necessary to the safety of the salvor vessel, under these circumstances the sacrifice was not a case of average and contribution *Ib.*

11. Salvage decreed on the facts. *The Speedwell*, 87, 96.
12. As a general rule, the crew cannot entitle themselves to salvage against their own vessel. *The Acorn*, 87, 98.
13. But this rule admits of the exceptions, that when a seaman, from whatever misfortune happening to the vessel, has been discharged from his contract and afterwards renders valuable services in saving the vessel from damage; or in a time of great peril and difficulty, in a spirit of adventurous and daring gallantry, performs services ultra above the requirements of his contract. *Ib.*

See LIEN, 1, 2.

SEAMEN.

1. When a seaman engages in a commercial adventure, the laws of the United States follow him until the voyage is completed, whether in a foreign country, or the Union. *Roberts* v. *Skolfield*, 184.
2. If a seaman proves unfit for the service for which he shipped, the master may degrade him to another duty. *The Australia*, 240.
3. But the seaman does not forfeit, necessarily, all claim for wages, but if he continues in the ship and is put to other duties, he shall be paid reasonable wages. *The Alonzo*, 318.
4. A seaman is justified in leaving a vessel for just fears for his personal safety. *Ib.*
5. The disobedience of a seaman is a very serious fault, and if persevered in is a forfeiture of all claim for wages. *The Palledo*, 321.
6. If the master attempts to overcome the refusal of duty, he must be careful what means he employs. But the general conduct and behavior of the seamen may be fully inquired into. *Ib.*

See WAGES.

SEAWORTHINESS.

1. For a ship to be seaworthy for the voyage, she must be manned by a competent master and crew. *The Vincennes*, 171.
2. In a libel by the owners on a charter-party, for refusing to furnish a cargo on the pretence that the ship was unseaworthy, the burthen of proving the seaworthiness is upon the owners. *Ib.*
3. When the question of seaworthiness is in issue, evidence of the performance of voyages, immediately before or after that contemplated, is inadmissible, except so far as they may offer just inferences as to her actual condition at the time. *Ib.*

See EVIDENCE, 1, 2.

SHIPPER.

1. When a ship, in consequence of a disaster occasioned by the dangers of the seas, is obliged to put into a port for repairs, if they are such as will require considerable time, the master, for the interest of the shipper, may sell such part of the cargo as is of a perishable nature. *The Velona*, 139.

2. The shipper may recover the proceeds of the sale by a libel against the ship. *Ib.*

3. In such case no freight is due to the master. *Ib.*

4. The only case in which a *pro rata* freight is due, is when the merchant voluntarily accepts his goods at an intermediate port, not when they are forced on him by necessity. *Ib.*

SHIPPING ARTICLES.

1. When unusual terms are introduced into a contract, courts of admiralty require that it be explained plainly to the men, or it will be set aside and they must be presumed to be engaged on the usual terms. *The Australia*, 240.

2. The law of the U. S. of 1790, requires every contract to be in writing, and if not the law is not binding on the men. They may leave the ship at any time, and demand wages at the highest price paid at that port at any time within three months before their engagements. *Ib.*

SMUGGLING.

Smuggling by seamen is a grave offence, but does not absolutely work a forfeiture of their whole wages. *The Horace E. Bell*, 236.

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STEAM VESSEL.

1. When a steamer and sailing vessel are approaching each other in such a direction that there is danger of a collision, the sailing vessel has the right of way, and should hold on her course, whether she has the wind free or is close-hauled.

The Louisa, 130.

2. It is the duty of the steamer to take the necessary precaution to keep out of her way. If she does not, and a collision happens, she will *prima facie* be deemed in fault. *Ib.*

3. When two vessels are approaching each other so that there is danger of their meeting, the general rule is that each vessel is to keep to the right. *Ib.*

4. This in all ordinary cases is the rule whether both are sailing vessels or both steamers, or one is a steamer and the other moved by the wind. *Ib.*

STOCKHOLDER.

See CORPORATION.

SET OFF.

A set-off, or compensation founded on contract, express or implied, is no defence to a libel in a cause of damage. But in a suit by a parent for the wrongful abduction of his minor son, where the damage, substantially, is loss of service, the court is not absolutely precluded from taking into consideration, in determining the amount of damage, the advances of clothing and other necessaries for the minor during the time. *The Platina*, 180.

TACKLE, &c., OF VESSEL.

See COLLISION.

VESSEL.

1. In a contract for the hire of a vessel on shares, that is, the hirer to victual, man, have the control of the vessel, and pay over to the proprietors a certain proportion of the net earnings as charter or hire, the general owners are not responsible for supplies or repairs furnished in a foreign port. *The H. B. Foster*, 165.

2. But the vessel is liable whether the hirer navigate her himself or employ another master. *Ib.*

3. Every person who furnishes such supplies or repairs to a foreign vessel is, by the maritime law, considered as contracting with the vessel herself as a principal debtor, as well as with the master and owners. *Ib.*

4. The natural and legal presumption in such a case is that the creditor looks to the vessel as one of his securities, because no person is ever presumed without proof to renounce any of the securities provided for him by law. *Ib.*

5. The general rule of the maritime law is that the ship is liable, in specie, for all the obligations of the master, whether arising *ex contractu* or *ex delicto*, resulting from acts done in the exercise and within the proper scope of his authority as master. *The John L. Dimmick*, 196.

6. The constitutional power of Congress to pass the law of 1850, § 1, relative to recording the transfer of vessels, raised but not decided.
The Martha Washington, 245.

7. A court of admiralty has no jurisdiction to decree possession of a vessel to the owners of a majority, when a title to such vessel is set up in mortgage. *Ib.*

8. To render a sale valid, made by a master of a vessel under the general authority vested in him, and convey a good title under it, there must be a necessity for such sale, and entire good faith on the part of the master.
The William Carey, 313.

See EQUITY, 1, 2, 3. OWNER OF VESSEL, 1, 2, 3. MATERIAL MEN, 1, 2, 3, 4.

VOYAGE.

1. Where a minor shipped for a whaling voyage, under the direction of his father, who furnished his outfit of clothing, the bill was rightly brought in the father's name. *Gifford* v. *Kollock*, 45.

2. A description of a whaling voyage, 'To the North Pacific ocean and elsewhere,' is a defective description. A contract for a voyage that has no termination of time or place, is a void contract. *Ib.*

3. If the usage of a particular port, or a particular trade, authorizes an interpolation of the port of departure as the port of termination, this must be qualified by another implied term, that the return of the vessel to her home port shall be within a reasonable time. *Ib.*

4. A whaling voyage is properly a cruise for taking whales, and does not include a trading voyage to dispose of the cargo after it is obtained. *Ib.*

5. If the master undertakes such a voyage, it seems that men engaged for the whaling voyage are not bound to continue in the vessel. *Ib.*

6. When a vessel is chartered at a monthly freight on a round voyage to one or more ports, and the language of the contract leaves it doubtful whether the voyage is single or divisible, for the purpose of freight, the presumption is that it is divisible, and against the waiver by the owner of his legal rights. And this presumption holds, although the freight is made payable after the ship returns to her home port. *The Brig Erie*, 225.

7. But if she is chartered for a gross sum for the round voyage, and that by the terms of the contract is made payable after her return to her home port, it seems that the presumption is, that the whole voyage is one and indivisible, and that no freight is due to the owner until the whole is completed. *Ib.*

8. But if not made payable on that or any other contingency than the delivery of her cargo, the presumption of the law is, that it is a divisible voyage. *Ib.*

9. A contract for a voyage which has no terminus is void. A voyage must terminate at a certain time or a certain port. *The Horace E. Bell*, 236.

WAGES.

1. By the ancient maritime law, constituting the common law of the sea, desertion by seamen, during the voyage, works a forfeiture of all wages previously earned. But the law is not imperative. The court may take into consideration palliating circumstances, not amounting to a justification, and mitigate the penalty to a reasonable indemnity to the owners. *Gifford* v. *Kollock*, 45.

2. The only case of desertion in which the forfeiture is absolute of the whole wages, is when all the requisites of the statute have been strictly observed. Statute July 20, 1790. *Ib.*

3. Fishermen who ship for a fishing voyage under a written contract, have a lien on the vessel for six months after the service is ended, and the fish sold for the value of their shares, which may be enforced by process in admiralty. *The Ianthe*, 126.

4. But the statute makes no provision for fishermen who ship without a written agreement, but leaves them to the rights which their contract by law gives them. *Ib.*

5. The act of 1790, which allows to seamen shipped without a written contract the highest rate of wages, does not apply to fishing voyages. *Ib.*

6. To entitle seamen to double wages, under the act of Congress, July, 1790, c. 29, § 9, on account of being put on short allowance of provisions, both the conditions mentioned in the act must concur, the vessel must have left her last port with a less amount of provisions than is required by the act, and the crew must have actually been put on short allowance during the voyage. *The John L. Dimmick*, 196.

7. The statute is in its nature a penal law, and is not to be enlarged byconstruction beyond the natural and obvious meaning of its terms. *Ib.*

8. To bring a case within the statute, the short allowance must be during the passage of the vessel, and before she arrived at her port of destination. *Ib.*

9. When the crew is put on short allowance without necessity, in a case not within the act of Congress, there is a wrong in breach of contract, and a remedy will be given by a court of admiralty, in the form of additional wages. *Ib.*

10. It is a well-understood term of contract, that the crew, during the period of their service, shall be furnished with provisions by the owners, sufficient in amount and of a suitable quality; and to refuse such a supply, without necessity, is as much a breach of the contract as to refuse payment of their wages, though this obligation is not expressed in the written or printed contract. *Ib.*

11. When a ship was lying in the bay of Mobile four months, waiting for cargo, and the usual supply of provisions from the ship's store were withheld, the crew being required to furnish themselves, by taking oysters from the oyster-beds, when the state of the weather permitted it to be done, and the supply being insufficient in quantity, they were held to be entitled to additional wages. *Ib.*

12. The daily allowance to seamen, in the merchant service, ought to be equivalent to the navy ration. *Ib.*

13. Smuggling by seamen, though a grave offence, does not work an absolute forfeiture of their whole wages. *The Horace E. Bell*, 236.

14. A seaman is entitled to his wages as soon as he has completed his contract and is discharged from the vessel. *The Susan*, 222.

15. The owner and charterer as between themselves may make the whole freight, in such a voyage, to depend on the safe arrival of the ship at her home port, or on any other contingency. *The Brig Erie*, 225.

16. But when they make the freight to depend on any farther condition than the safe delivery of the cargo, this will not affect the right of others who have an interest in the freight, as seamen for their wages, or lenders on bottomry. *Ib.*

17. They trust to the ship, and have their rights against the freight as appurtenant to the ship; and as far as she has earned freight, by the maritime law, their rights cannot be impaired by any private agreement between the owner and charterer, to which they are strangers. *Ib.*

18. Wages allowed on the facts. *The Jasper*, 296.

19. Intemperance, if it wholly disqualifies a seaman from performing his duties, is a forfeiture of all wages, but if occasional only, it is marked by a deduction of wages according to circumstances, or by the courts entirely overlooked. *Ib.*

20. The price of seamen's wages ought to be fixed according to the plain meaning of the parties, when that can be understood. *The Rochambeau*, 304.

21. Seamen are a plain people and are not to be presumed to advert to refined distinctions of law when they are not alluded to in the terms of the contract, or mentioned when it was made. *Ib.*

22. Though a seaman may be disrated for incapacity, he does not, necessarily, forfeit a claim for reasonable wages, earned, while continuing in the ship, in another capacity. *The Alonzo*, 318.

23. Disobedience of seamen, if persevered in, works a forfeiture of wages. *The Palledo*, 321.

See DESERTION, 3, 4.

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